IN THE

United States Circuit Court of Appeals

NINTH CIRCUIT.

SOUTHERN OREGON COMPANY,
Defendant and Appellant.

v.

UNITED STATES OF AMERICA,
Complainant and Appellee.

BRIEF OF THE FACTS FOR THE UNITED STATES.

CONSTANTINE J. SMYTH,
Special Assistant to the Attorney General.

HOGAN LINOTYPING CO., OMAHA

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This is an appeal from a decree in favor of the United States in an action brought by it to have forfeited the title to 96,000 acres of land, on the ground that the grant of the land from the government contained conditions subsequent which had been breached, and for general equitable relief. The court held that the grant was not upon conditions subsequent, but that it contained certain enforceable covenants which had been violated by the appellant and certain of its predecessors in title, and hence entered the decree complained of.

ABSTRACT OF PLEADINGS.

The Bill Sets Forth (R. p. 2):

1. The names of the parties and that the defendant is an Oregon corporation.

2. The granting Act, which reads:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there be, and hereby is, granted to the State of Oregon, to aid in the construction of a military wagon road from the navigable waters of Coos Bay to Roseburg, alternate sections of public lands, designated by odd numbers, to the extent of three sections in width on each side of said road: *Provided,* That the lands hereby granted shall be exclusively applied to the construction of said road and to no other purpose, and shall be disposed of only as the work progresses; *Provided further,* That the grant of lands hereby made shall be upon the condition that the lands shall be sold to any one person only in quantities not greater than one quarter section, and for a price not exceeding two dollars and fifty cents per acre; *And provided further,* That any and all lands heretofore reserved to the United States, or otherwise appropriated by act of Congress or other competent authority, be, and the same are hereby, reserved from the operation of this act, except so far as it may be necessary to locate the route of said road through the same, in which case the right of way to the width of one hundred feet is granted: *And provided further,* That the grant made shall not embrace any mineral lands of the United States, or any lands to which homestead or preemption rights have attached.

Sec. 2. *And be it further enacted,* That the lands hereby granted to said State shall be disposed of by the legislature thereof for the purpose aforesaid, and for no other; and the said road shall be and remain a public highway for the use of the Government of the United States free from tolls or other charges upon the transportation of any property, troops, or mails of the United States.

Sec. 3. *And be it further enacted,* That said road shall be constructed with such width, graduation, and bridge as to permit of its regular use as a wagon road, and in such other special manner as the State of Oregon may prescribe.

Sec. 4. *And be it further enacted,* That the State of Oregon is authorized to locate and use in the construction of said road an additional amount of public lands, not previously reserved to the United States, nor otherwise disposed of, and not exceeding six miles in distance from it, equal to the amount reserved from the operation of this act in the first section of the same, to be selected in alternate odd sections, as provided in section first of this act.

Sec. 5. *And be it further enacted,* That lands hereby granted to said State shall be disposed of only in the following manner, that is to say, when the governor of said State shall certify to the Secretary of the Interior that ten continuous miles of said road are completed, then a quantity of the land hereby granted, not to exceed thirty sections, may be sold, and so on from time to time, until said road shall be completed; and if said road is not completed within five years no further sale shall be made, and the lands remaining unsold shall revert to the United States: *Provided, however,* That the entire amount of public land granted by this act shall not exceed three sections per mile for each mile actually constructed.

Sec. 6. *And be it further enacted,* That the United States surveyor general for the district of Oregon shall cause said lands, so granted, to be surveyed at the earliest practical period after said State shall have enacted the necessary legislation to carry this act into effect.

3. That through inadvertence the aforesaid Act of Congress contained no provision authorizing the issuance of patents, and, to correct this omission, Congress did, on June 18, 1874, pass the following act:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in all cases when the roads in aid of the construction of which lands were granted are shown by the certificate of the governor of the State of Oregon, as in said act provided, to have been constructed and completed, patents for said lands shall issue in due form to the State of Oregon, as fast as the same shall, under said grants, be selected and certified, unless the State of Oregon shall by public act have transferred its interests in said lands to any corporation or corporations, in which case the patents shall issue from the General Land Office to such corporation or corporations upon their payment of the necessary expenses thereof: *Provided,* that this shall not be construed to revive any land grant already expired nor to create any new rights of any kind except to provide for issuing patents for lands to which the State is already entitled.

4. That on October 22, 1870, the State of Oregon passed an act entitled "An Act donating certain lands to the Coos Bay Wagon Road Company," which, after reciting *verbatim* the aforementioned congressional act of 1869, reads:

Be it enacted by the Legislative Assembly of the State of Oregon.

Section 1. That there is hereby granted to the Coos Bay Wagon Road Company all lands, right-of-way, privileges, and immunities heretofore granted or pledged to this State by the Act of Congress, in this act heretofore recited for the purpose of aiding said company in constructing the road mentioned and described, in said Act of Congress, upon the conditions and limitations therein prescribed.

Sec. 2. There is also hereby granted and pledged to said company all moneys, lands, rights, privileges and immunities which may be hereafter granted to this State to aid in the construction of said road for the purposes, and upon the conditions and limitations mentioned in said Act of Congress, or which may be mentioned in any further grants of money or lands to aid in constructing such road.

Section 3. Inasmuch as there is no law upon this subject at the present time this act shall be in force from and after its passage.

5. That the granted lands are situate in the counties of Coos and Douglas.

6. That the Wagon Road Company represented to the officers of the United States that it had constructed the road contemplated by the acts of Congress and was entitled to the granted lands, and applied to the Interior Department for patents, which were issued to the company as follows:

Patent No. 1, dated February 12, 1875, embracing 42,496.93 acres;

Patent No. 2, dated March 18, 1876, embracing 1,080.00 acres;

Patent No. 3, dated November 8, 1876, embracing 61,111.53 acres;

Patent No. 4, dated February 17, 1877, embracing 431.65 acres.

7. That prior to May 31, 1875, the Wagon Road Company sold and conveyed about 6,963 acres of the granted lands to, approximately, 53 purchasers, as is shown by exhibit "A" attached to the bill.

8. That in evasion of the restrictive proviso of the granting act the Wagon Road Company, on May 31, 1875, entered into a contract with one John Miller to convey to him 96,676.96 acres of the granted lands, and on the same day delivered to Miller a conveyance for 35,534 acres for the sum of $35,534, and also a deed of the wagon road for the sum of $37,200.

9. That the said Miller, in the transactions aforesaid, was acting for the benefit of Collis P. Huntington, Charles Crocker, Leland Stanford and Mary Hopkins, and that on June 22, 1875, he conveyed by deed the said 35,534 acres to Collis P. Huntington, Charles Crocker, Leland Stanford and Mary Hopkins.

10. That by the contract between the Wagon Road Company and Miller, it was provided that the directors of the company should continue to act for the use and benefit of Miller, and that this was done for the purpose of enabling Miller, and those for whom he was acting, to conceal from the government the violations of the

granting act resulting from the conveyances to him; that the patents were applied for in the name of the Wagon Road Company, and that its corporate existence was maintained for the purpose ofconcealing from the government the fact that the land had been transferred in violation of the grant.

11. That on March 27, 1882, Huntington, Stanford and Hopkins conveyed to the said Charles Crocker and their interests under the deed from Miller to them; that on December 20, 1883, Crocker conveyed the same land to Wm. H. Besse, who on December 29, following, conveyed the same to Russell Gray, who on January 5, 1884, conveyed the same to the Oregon Southern Improvement Company, an Oregon corporation.

12. That on January 7, 1884, in violation of the grant the Wagon Road Company conveyed to Wm. H. Besse the 61,143.37 acres, being the balance of the grant, and that on June 4, following, Besse, conveyed the same lands to the Oregon Southern Improvement Company; thus giving to that company 96,677.37 acres, the amount for which this action is prosecuted.

13. That on January 1, 1884, in further violation of the grant the Oregon Southern Improvement Company gave to the Boston Safe Deposit and Trust Company a trust deed, covering all the property then owned by it or thereafter to be acquired, to secure the payment of the bonds of the first named company. This covered all of the granted lands, *as well as other property.*

14. That on November 9, 1886, the Boston Safe

Deposit and Trust Company was succeeded by Wm. J. Rotch and Edward D. Mandell as trustees under the deed of trust.

15. That on December 28, 1886, these trustees, instituted a suit in the Circuit Court of the United States for Oregon to foreclose the trust deeds; that on April 11, 1887, a decree was entered directing the defendant Oregon Southern Improvement Company to pay the trustees the sum of $1,516,666.66; that in default of the payment, the property was sold in pursuance of the decree, by George H. Durham, as Master, to Wm. J. Rotch and Wm. W. Crapo for the purported price of $120,000; that on November 16, following, Durham, as Master, conveyed the property to the purchasers, Rotch and Crapo; that on December 14, following, Rotch and Crapo conveyed the land to the *Southern Oregon Company*, an Oregon corporation.

16. That Rotch, Mandell and Crapo acted as agents in all the transactions aforementioned for the benefit of the Oregon Southern Improvement Company, its officers and stockholders, who were *identical* with the stockholders and owners of the Southern Oregon Company, and that, in fact, the latter company was but a reorganization of the first company.

17. That the aforesaid deed of trust was executed for the benefit of the stockholders of the Oregon Southern Improvement Company; that the indebtedness which it pretended to secure, was fictitious, and represented simply the interest of the stockholders; that the deed of trust was executed and foreclosed with the intent of evading and defeating the rights of the government

under the grant and in the hope that the conditional estate created by the grant might be converted into an unconditional one, for the use and benefit of the stockholders and owners of the Oregon Southern Improvement Company.

18. That none of the bonds, purported to be secured by said deed of trust, were held by others than stockholders of the Oregon Southern Improvement Company, and that the price alleged to have been paid for the property, except such as was necessary for court expenses, was paid by the stockholders of the Oregon Southern Improvement Company, and constituted a mere nominal transaction for the purpose of defeating the rights of the government.

19. That in addition to the sales of the granted lands, already mentioned, there were other sales after May 31, 1875, when the Miller deed was made, and that these sales are described in exhibit "G" attached to the bill; that the Southern Oregon Company claims to be the owner of the lands sued for, a description of which is given in exhibit "H" attached to the bill; that no one claims any interest in the lands but the complainant and defendant; that said lands are wild and unoccupied and are of a value exceeding $4,000,000, and that the defendant, in violation of the terms of the grant, asserts and assumes to exercise and enjoy an unconditional estate in all said lands, free from each and all of the terms and provisions of the grant.

20. That the Coos Bay Wagon Road Company and Southern Oregon Improvement Company have been dissolved.

21. That the parties to each transaction mentioned in the bill, except the complainant, had notice of the transactions of what had theretofore transpired with respect to the title.

22. That all the lands sued for are situated in a *most* remote portion of the State of Oregon, and are difficult of access; and that the Coos Bay Wagon Road Company, and those claiming under it, have from time to time sold small quantities of the land ostensibly in pursuance of the terms of the grant.

23. That so far as the complainant knows neither the Wagon Road Company, nor any of the parties succeeding to it, appeared to be, or were known to the complainant to be, asserting any estate in the lands in violation of the terms of the grant, but on the contrary each of them was ostensibly claiming no rights in the lands, except as subject to the provisions and conditions of the grant.

24. That by reason of the premises, the violations set out in the bill were wholly unknown to the complainant until 1907; that thereupon the violations were brought to the attention of Congress and, as a result, a joint resolution was passed and approved April 30, 1908, in pursuance of which this action was instituted

25. The resolution reads:

> That the Attorney-General of the United States be, and he hereby is, authorized and directed to institute and prosecute any and all suits in equity, actions at law, and other proceedings which he may deem adequate and appropriate to enforce any and all rights and remedies of the United States of

America in any manner arising or growing out of or pertaining to either or any of the following described Acts of Congress, to-wit: * * *; also "An Act granting lands to the State of Oregon to aid in the construction of a military wagon road from the navigable waters of Coos Bay to Rosebury in said State,' approved March third, eighteen hundred and sixty-nine; * * *; including all rights and remedies in any manner relating to the lands, or any part thereof, granted by either or any of said Acts; and in and by any and all such suits, actions, or proceedings the Attorney-General shall, in such manner as he shall deem appropriate, assert all rights and remedies existing in favor of the United States relating to subject of such suits, actions and proceedings, including the claim on behalf of the United States that the lands granted by each of said Acts respectively, or any part thereof, have been and are forfeited to the United States by reason of any breaches or violations of any of the terms or conditions of either or any of said Acts which may be alleged and established in any such suits, actions, or proceedings; it not being intended hereby to determine the right of the United States to any such forfeiture or forfeitures, but it being intended to fully authorize the Attorney-General in and by such suits, actions or proceeds to assert on behalf of the United States and the court or courts before which such suits, actions, or proceedings may be instituted or pending to entertain, consider and adjudicate the claim and rights of the United States to such forfeiture, or forfeitures, and if found to enforce the same: *Resolved further,* That the authority and direction hereinbefore given shall extend to any and all suits, actions or proceedings which may be instituted or pending under the authority of the Attorney-General at the time of the adopting and approval hereof.

26. That by reason of the aforesaid breaches all of the lands mentioned in exhibit "H" are forfeited to the complainant, free from all right of the defendant; and that pursuant to the authority contained in the joint resolution, the complainant assumes the title and ownership of said lands.

27. That the defendant company has repeatedly threatened, and still threatens, and will, unless restrained, sell and convey, or in some manner encumber or impair the title to said lands, and will, unless restrained, commit waste upon said lands, particularly as to the timber, thereby causing irreparable injury to the complainant.

The Bill Prays:

1. That the defendant be required to make discovery as to all matters aforesaid and to answer, but not under oath, the matters and things charged in the bill.

1. That a decree be entered:

(a) Forfeiting all the lands described in exhibit "H," attached to the bill, and reinvesting the title thereto in the complainant.

(b) Quieting the title thereto in the complainant.

(c) Enjoining the defendant from asserting any right or interest in the lands, or from in any manner selling, or offering them for sale, and from conveying or in any manner disposing of them; from negotiating or recording any document, or from doing any other thing affecting the use or title to the lands; from going upon the lands and cutting or removing, or in any manner

using the timber, trees or other natural products thereof; from committing waste upon the lands, or in any manner using or interfering with them.

(d) And from doing any of the acts aforesaid pending the litigation.

3. That the complainant may have such other and further relief as the equities in the case may require, including costs.

4. That process may issue.

There are eight exhibits attached to the bill:

"A" contains a description of the lands sold before May 31, 1875 (R. p. 36).

"B" is a copy of the contract between the Wagon Road Company and Miller (R. p. 42).

"C" is a copy of the deed from the Wagon Road Company to Miller, showing a consideration of $35,534 (R. p. 55).

"D" is a copy of the deed for the wagon road from the Wagon Road Company to Miller, showing a consideration of $37,200 (R. p. 72).

"E" is a copy of the deed from the Wagon Road Company to Besse of the 61,143.37 acres for the stated consideration of $91,715.05 (R. p. 78).

"F" is a copy of the deed of trust from the Oregon Southern Improvement Company to Boston Safe Deposit and Trust Company (R. p. 101).

"G" describes the lands sold in small quantities subsequent to May 31, 1875 (R. p. 127).

"H" describes the lands involved in this suit (R. p. 131).

The Answer (R. p. 143):

1. Admits the corporate character of the defendant, the passage of the Act of 1869, the Act of 1874, and the Legislative Act of 1870; that the Wagon Road Company was a corporation, as alleged in the bill, and that the grant lands are situated in the counties of Coos and Douglas.

2. Denies that the defendant enjoys the benefits of the acts of Congress pleaded in the bill, except as stated in the answer, and denies that the patents were issued in pursuance of the Act of March 3, 1869, but alleges that they emerged under the authority of the Act of 1874.

3. Admits the sale of 6,963 acres of land before May 31, 1875.

4. Admits the contract between the Wagon Road Company and Miller for 96,676.96 acres; but alleges that the sale was made in good faith and for a valuable consideration; that the Wagon Road Company then had an unconditional fee simple title to the lands evidenced by patent No. 1.

5. Admits the two deeds of May 31, 1875, from the Wagon Road Company to Miller, one for 35,534 acres of land and the other for the wagon road; alleges they were made in good faith and for a valuable consideration, but denies that they were in violation of the terms of the grant.

6. Alleges that defendant is without knowledge as to whether Miller was acting only as agent, as stated in the bill, for Huntington, Crocker, Stanford and Hopkins, but denies that the contract or deeds aforesaid were made for the purpose of concealing the truth.

7. Admits the conveyance of the land and wagon road by Miller to Huntington and others on June 22, 1875.

8. Denies that the corporate existence of the Wagon Road Company was maintained for the purposes alleged in the bill and admits the issuance of patents Nos. 2, 3 and 4 to the Wagon Road Company, but denies that they were issued by the United States in ignorance of the facts stated in the bill; alleges that by the passage of the Act of June 18, 1874, Congress ratified the Act of the State of Oregon of June 22, 1870, by which the lands were transferred to the Wagon Road Company.

9. Alleges that on May 31, 1875, the wagon road had been fully completed and its completion certified to the Secretary of the Interior by the governor of the State of Oregon; that the whole of the lands granted to the company, 105,120.11 acres, had been fully earned: that it was entitled to patents therefor; that its corporate existence was maintained for the purpose of receiving these patents and not for the purpose of deception.

10. Admits the transfers from Huntington and others to Crocker, from Crocker to Besse, from Besse to Gray and from Gray to the Oregon Southern

Improvement Company; also the transfers from the Wagon Road Company to Besse and from Besse to the Oregon Southern Improvement Company; but denies that the deed from the Wagon Road Company was made in violation of the grant, for, as alleged, prior to its execution of the deed Congress had, by the Act of June 18, 1874, waived the conditions of the restrictive proviso, and authorized the issuance of patents, free and clear of all conditions; and denies that Besse was the agent of the Oregon Southern Improvement Company.

12. Admits that the Oregon Southern Improvement Company delivered to the Boston Safe Deposit and Trust Company the deed of trust mentioned in the bill, but denies that it was in violation of the granting act.

13. Alleges that defendant believes the allegations of the bill, with respect to the foreclosure of the trust deed, the purchase of the property at the foreclosure sale, and the deeding of it to the Southern Oregon Company, to be true.

14. States that defendant neither admits nor denies the allegations of the bill, to the effect that Rotch, Mandell and Crapo acted in all the transactions set out in the bill as agents of the Oregon Southern Improvement Company; that the Southern Oregon Company was organized by the stockholders of the first named company, and that the stockholders of the one were identical with the stockholders of the other.

Denies that the trust deed was executed for the benefit of the stockholders of the Oregon Southern

Improvement Company; that the indebtedness which it secures was fictitious; that the foreclosure was for the purpose of evading the restrictive provisions of the grant; that none of the bonds secured by the trust deed were owned by others than the stockholders of the Oregon Southern Improvement Company; that the price purported to have been paid at the foreclosure sale was not paid in fact, and that the foreclosure and sale therein involved no actual change of ownership. But alleges that the sale was in good faith; that the title to the property actually passed, and that the plaintiff knew, or could, by proper inquiry, have known all the facts with respect to the matter.

15. Admits that since May 31, 1875, some of the granted lands were sold in small quantities and that exhibit "G," attached to the bill, contains an accurate schedule thereof.

16. Admits that the company claims to be the owner of the lands in question, but denies that they are worth over four millions of dollars, and alleges that they are worth not more than a million dollars.

17. Admits that the Wagon Road Company and the Oregon Southern Improvement Company have been dissolved.

18. Denies that the defendant, at the time it purchased, knew any of the transactions that had theretofore transpired, as set forth in the bill, *other* than "as disclosed by the records and legislation with reference to the said lands;" and denies that those through whom

it claims title, subsequent to the government, had the knowledge charged to them in the bill.

19. Admits that it claims an unconditional estate in the lands described in exhibit "H," attached to the bill, being the lands sued for, free from all the conditions of the grant.

20. Admits that the lands sued for are in a remote portion of the State of Oregon; that the Wagon Road Company and its successors have, from time to time, sold small quantities thereof, but denies that the Wagon Road Company, or any of said parties claim the lands in violation of the act of Congress; that any of them were claiming no rights in said lands, except as the beneficiaries of the act of Congress; and that any alleged violation of the grant were concealed from the plaintiff, or were wholly unknown to the plaintiff until 1907.

21. Admits the passage of the joint resolution authorizing the bringing of the suit.

22. Denies that the lands sued for have been forfeited to the United States.

23. Denies that the defendant has repeatedly threatened to sell or convey the lands sued for, and denies that the defendant will commit waste if not restrained.

24. Alleges that the wagon road was completed before March 3, 1874, and that as sections were completed the lands were sold, as the company could find

purchasers, in quantities of 160 acres, more or less, to one person before May 31, 1875; alleges that more than 43 years have elapsed since the date of the grant, and that during all that time the Wagon Road Company and all persons claiming under it, including the defendant, have been in open and notorious possession of the land, claiming it by adverse possession, and that the government has acquiesced in the claim.

25. Alleges that the suit is barred by Section 391 of Lord's Oregon Laws, Section 8 of the Act of Congress approved March 3, 1891, and Section 1 of the Act of Congress approved March 2, 1896.

26. Alleges that the action is also barred by laches, acquiescence and ratification, and by estoppel arising therefrom, as shown by the following acts: the passage by Congress of the Act of 1874, with the knowledge, as alleged, of the transfer of the land from the State of Oregon to the Wagon Road Company; open and notorious possession, such as the nature of the lands would admit, by the Wagon Road Company, the defendant and the intermediate holders of the title; the use of the wagon road by the United States under the terms of the grant; and acquiescence for upwards of 40 years in the various transfers shown by the records.

27. Alleges that Congress, being wholly without knowledge of the character of the lands, adopted the restrictive proviso, and thereby attached to the act a condition, which wholly defeated the object for which the act was passed, and said proviso, being, as alleged, repugnant to the grant, is wholly void.

28. Alleges:

(a) That defendant is a *bona fide* purchaser in good faith and for full value;

(b) That before purchasing it carefully examined all legislation by Congress and the State of Oregon affecting the title to the lands, made special inquiry concerning the same, carefully examined the patents, and was advised by eminent counsel that the title was clear and unincumbered.

(c) That the deeds of conveyance made before May 31, 1875, were recorded, and carried notice to all, including the plaintiff, that the Wagon Road Company was selling lands to a single purchaser in greater quantities than 160 acres.

29. That through inquiry the defendant also ascertained, before purchasing:

(a) The terms of the granting Act of 1869; the terms of the legislative Act of October 22, 1870; the acceptance by the Coos Bay Wagon Road Company of the transfer of the lands; that the completion of the road had been duly certified to the governor of the State as provided by the Act of 1869; that the Wagon Road Company had sold all the lands for which purchasers could be found willing to purchase in tracts of 160 acres.

(b) The existence of the contract between Miller and the Wagon Road Company, and the conveyance of the 35,533.93 acres to Miller; also that all deeds to the lands were duly recorded in the counties in which the lands severally lie, to-wit, the counties of Douglas and Coos.

(c) That in accordance with the Act of June 18, 1874, the United States caused patents to be delivered to the Wagon Road Company as follows:

Patent No. 1, dated February 12, 1875, for 42,496.93 acres.

Patent No. 2, dated March 13, 1876, for 1,080 acres.

Patent No. 3, dated November 8, 1876, for 61,111.53 acres.

Patent No. 4, dated February 17, 1877, for 431.65 acres.

(d) That under the contract with Miller he was to pay a dollar an acre, or $35,534, for the land deeded to him; that he conveyed the deeded lands, and the wagon road, to Huntington and others on May 31, 1875, and that these deeds were duly recorded.

(e) That the Wagon Road Company upon receiving patents Nos. 2, 3 and 4 notified Huntington and his associates, they having in the meantime received an assignment from Miller of his contract, that it was prepared to convey to them the balance of the land, to-wit, 61,111.93 acres; that Huntington and his associates refused to accept a conveyance; that the Wagon Road Company commenced suit in the Circuit Court of the State of Oregon for Coos County, praying for an order that the lands *conveyed* by Miller to Crocker be subjected to a vendor's lien in favor of the Wagon Road Company for the balance of the purchase money under the contract; that the case was transferred to the Circuit Court of the United States for the District of

Oregon and that a decree was entered allowing the prayer of the complaint.

(f) That Charles Crocker, by a deed from Huntington and others, dated March 27, 1882, became the owner of the property conveyed by Miller to Huntington and his associates; that Crocker conveyed these lands to Besse, Besse to Gray and Gray to the Oregon Southern Improvement Company, as alleged in the bill.

(g) That the Wagon Road Company conveyed to Besse the lands, 61,111.93 acres, covered by patents Nos. 2, 3 and 4, who later conveyed the same lands to the Oregon Southern Improvement Company on January 4, 1884.

(h) That on January 1, 1884, the Oregon Southern Improvement Company made a trust deed to the Boston Safe Deposit and Trust Company of all the granted lands, and a further trust deed of the same lands to the same company in 1885.

(i) That on December 9, 1886, the Boston Safe Deposit and Trust Company was succeeded by Wm. Rotch and Edward D. Mandell as trustees; that the trust deed was foreclosed and the property sold in default of the amount then due, viz., $1,516,666.66; that it was purchased by Wm. J. Rotch and Wm. W. Crapo, to whom a deed therefor was subsequently made.

(j) That on December 14, 1887, Rotch and Crapo conveyed to the defendant company, in good faith, and for full value; and that the defendant purchased same in good faith for full value and without notice that the

title was conditional; that all the deeds just referred to were duly recorded, and that the plaintiff had actual and constructive notice of every transaction theretofore set out.

30. Alleges again that each purchaser acquired the title in the open market and in good faith for full value, believing the same to be without defects and that the transactions mentioned extended through a period of 38 years.

31. Alleges that the holders of the title have paid up to the year 1909 taxes in the sum of $172,443.49, and that the taxes for the years 1909 to 1912 amounting to $99,752.62 have not been paid, but that defendant has deposited a certified check with the Clerk of Coos County, Oregon, to provide for their payment.

32. Alleges that at the time the granting act was passed the United States mails were carried between the navigable waters of Coos Bay and Roseburg with great difficulty and at large expense; that property and troops of the United States could not be transferred between those points without loss of time and large cost; that to avoid this condition Congress passed the Act of March 3, 1869; that the wagon road was completed in due time, at large expense, and formed an excellent highway between the points mentioned; that by its completion, the distance which the property, trops and mails of the United States had to be carried between said points, was greatly reduced; that the government availed itself of the use of the wagon road imemdiately after its completion for the transportation of property, troops and the mails, and has continued to

do so for a term of more than 39 years, without tolls or other charges, much to its financial advantage; that the price for carrying the mails alone has been reduced many thousands of dollars.

33. Alleges that the grant was on *in praesenti* to the State of Oregon, a sovereign State, and that the restrictive proviso does not constitute a condition subsequent, but mere a non-enforceable direction or request as to the future distribution of the lands, and was waived and abandoned by the Act of June 18, 1874, and by the issuance of patents thereafter.

34. Alleges that on February 27, 1896; February 29, 1896; August 25, 1897, and February 18, 1896, the plaintiff commenced certain suits in the Circuit Court of the United States, for the District of Oregon, against certain parties, including the defendant, to recover certain of the lands described in the suit, and that the decision in each of those suits constitute a bar to this suit.

35. Alleges that at the time said suits were commenced the complainant was fully informed of all the facts set out in the complaint in this case, and alleged in neither of said suits that the grant to the State of Oregon was a condition subsequent, or that there had been a forfeiture or breach of the condition.

36. Alleges that by the institution of said suits and the acquiescence by the complainant in the decrees therein, the United States waived any and all rights which it may have had to assert forfeiture of the lands described in the bill, and is estopped from asserting title thereto.

37. Alleges that this court, as a court of equity, is without jurisdiction to determine the case.

38. Alleges that the patents mentioned were issued to the Wagon Road Company in accordance with the Act of June 18, 1874, and not otherwise; that said act ratified the action of the State of Oregon in granting the lands to one person, without reference to the limitation of 160 acres, and, by reason of this fact, plaintiff is estopped to say the subsequent transfers were in violation of the act.

39. Alleges again that by the compact between the State and the United States the latter has no constitutional right to interfere with the control of the lands in question and, therefore, the suit should be dismissed.

THE TESTIMONY.

I.

Passage of the Congressional and Legislative Acts Admitted.

The passage and approval of the Congressional Granting Act of March 3, 1869, and the Act of the State Legislature, by which the grant was transferred to the Wagon Road Company, are admitted (Ans., R. p. 143).

II.

Wagon Road Company Was Substituted for the State.

The Coos Bay Wagon Road Company filed its articles of incorporation with the Secretary of the State

of Oregon on April 15, 1868. The purpose of the corporation was to construct and maintain a wagon road from Coos Bay to Douglas County, Oregon, and its capital stock was $40,000 (R. p. 402).

Supplemental articles, filed January 31, 1870, provided that the contemplated wagon road should extend from Coos Bay to Roseburg (Id.).

The Legislature of Oregon on October 22, 1870, passed an act granting to the Coss Bay Wagon Road Company all the lands granted to the State by the Act of March 3, 1869. This act recites the passage of the granting Act of March 3, 1869, and provides in Section 1:

> That there is hereby granted to the Coos Bay Wagon Road Company all lands, rights-of-way, privileges, and immunities heretofore granted or pledged to this State by the Act of Congress, in this act heretofore recited for the purpose of aiding said company in constructing the road mentioned and described, in said Act of Congress, upon the *conditions and limitations therein prescribed* (Ans., R. p. 143). (Italics mine.)

ASSENT OF WAGON ROAD.

On March 11, 1870, Mr. Aaron Rose, as president of the Wagon Road Company, sent to the Commissioner of the General Land Office a letter which, in part, reads as follows:

> Herewith I have the honor to transmit to you a copy of an "Act of the Legislative Assembly of the State of Oregon entitled 'An Act donating certain lands to Coos Bay Wagon Road Company,'" also transmit to you a map showing the

survey and definite location of the road. If any more papers are necessary please notify me (R. p. (403).

On April 11, 1872, the Wagon Road Company again amended its articles by inserting the following:

> This corporation hereby assents to and accepts the grant of lands, right-of-way and all of the conditions and provisions of the Act of Congress approved March 3, 1869, entitled "An Act granting lands to the State of Oregon to aid in the construction of a military wagon road from the navigable waters of Coos Bay to Roseburg in said State." And also of the act of the legislative assembly of the State of Oregon, approved October 22, 1870, entitled An Act donating certain lands to the Coos Bay Wagon Road Company. And also assents to and accepts all further acts of said Congress or of the Legislative Assembly of the State of Oregon granting lands or other property or thing in aid of the construction of said road. * * *
>
> Also to organize, establish and maintain a system of immigration from other states and territories of the United States and from Europe to the State of Oregon. * * * (R. p. 403).

The first list selecting lands was prepared by the company on March 22, 1873, and contains the following:

> The Coos Bay Wagon Road Company under and by virtue of the Act of Congress entitled "An Act granting lands to the State of Oregon to aid in the construction of a military wagon road from the navigable waters of Coos Bay to Roseburg in said state, dated 3d of March, 1869," and the Act of the Legislative Assembly of the State of Oregon aproved 22d day of October, 1870, conveying said

"grant" to the Coos Bay Wagon Road Company * * * hereby make and file the following list of selections of public lands claimed by said company as enuring to it, and to which it is entitled under and by virtue of the grants and provisions of said Act of Congress (R. p. 404).

The oath attached to this list reads as follows:

I, A. R. Flint, being duly sworn, deposes and say that I am the land agent of the Coos Bay Wagon Road Company; that the foregoing list of lands which I hereby select is a correct list of a portion of the public lands claimed by the said company as enuring to the State of Oregon to aid in the construction of the wagon road * * * for which a grant of land was made by the Act of Congress approved on the 3d of March, 1869. * * * (Id.).

III.

The Construction and Acceptance of the Wagon Road.

In due time the governor of Oregon certified that the road was completed in conformity with the Act of Congress (Deft. Ex. 190, R. p. 537).

IV.

Sales Prior to the Issuance of Patents.

The Wagon Road Company prior to the issuance of any patents sold and conveyed to 53 individuals approximately 6,963 acres (R. p. 405). The aggregate consideration stated in the deeds is about $17,500, but this fact does not appear in the record.

V.

Passage of the Act of 1874, Authorizing the Issuance of Patents.

It created no new rights except the right to have the patents issued.

It is claimed that by the passage of the Act of June 18, 1874, and the issuance of patents in pursuance of it, the government waived and abandoned the restrictive proviso (Ans., R. p. 154).

The act is entitled "An Act to authorize the issuance of patents to the State of Oregon in certain cases" (*Supra,* p. 4).

When the bill was under debate in the Senate, the following occurred:

> Mr. Edmunds: There ought to be a provision in that this act shall not revive any land grant which has already expired, and providing that this bill shall create no new rights of any kind.
>
> Senator Kelly from Oregon answered: I have no objection to such an amendment; but the bill only applies to roads already completed.

Thereupon Mr. Edmund offered his amendment, which reads:

> Provided, that this act shall not be construed to revive any land grants already expired, or to create any new rights of any kind.

Commenting upon the amendment, Senator Sargent said:

a steamboat costing about $100,000, and other property (R. p. 405).

The Southern Oregon Company, also an Oregon corporation, was organized by the bondholders and stockholders of the Oregon Southern Improvement Company, on March 25, 1886, for the purpose of purchasing the property of the latter company at a judicial sale made in pursuance of the foreclosure of the trust deed given by the Oregon Southern Improvement Company to secure its bonds. It was merely a reorganization of the last named company. For many years it operated canning works and a large saw mill upon the Luce lands, and controlled the chief industries of Empire City on Coos Bay (R. p. 405).

VIII.

How Defendant Acquired Title from Wagon Road Company.

The Wagon Road Company on May 31, 1875, conveyed to John Miller 35,534 acres; Miller conveyed to Huntington, Crocker, Hopkins and Stanford, June 22, 1875; Huntington and the other associates of Crocker conveyed to Crocker by deed of March 27, 1882; Crocker conveyed to Wm. H. Besse by deed of December 20, 1883; Besse conveyed to Russell Gray by deed of December 29, 1883, and Gray conveyed to the Oregon Southern Improvement Company by deed of January 5, 1884 (R. p. 406).

The Wagon Road Company on January 7, 1884, conveyed to Wm. H. Besse 61,143.37 acres, the balance

of the grant; and Besse conveyed to the Oregon Southern Improvement Company by deed of June 4, 1884 (Id.).

The Oregon Southern Improvement Company executed and delivered to the Boston Safe Deposit and Trust Company, on January 1, 1884, a trust deed upon all the property, real and personal, then owned or thereafter to be acquired by it, to secure the payment of the bonds issued by the grantor company (Id.).

On November 9, 1886, the Boston Safe Deposit and Trust Company, as trustee, was succeeded by William J. Rotch and Edward D. Mandell, as trustees. These trustees on December 28, 1886, instituted a suit in the Circuit Court of the United States for Oregon, to foreclose the trust deed; on April 11, 1887, a decree was entered directing the defendant Oregon Southern Improvement Company to pay the sum of $1,516,666.66 and that in default of the payment the property should be sold; payment was not made and the property was sold by George H. Durham as master to William J. Rotch and William Crapo for the reported price of $120,000; on November 16, following, Durham as master conveyed the property to the purchasers Rotch and Crapo; and on December, following, Rotch and Crapo conveyed it to the Southern Oregon Company (R. p. 406).

IX.

Small Sales to Individuals.

Subsequent to May 31, 1875, 4,470 acres of the lands were sold to individuals, eight sales by the Wagon Road

Company, six by Crocker, two by the Oregon Southern Improvement Company and fourteen by the Southern Oregon Company (R. pp. 27, 158).

X.

Breaches of the Restrictive Proviso by the Wagon Road Company.

The bill charges that the contract between the Wagon Road Company and Miller for the sale of the 96,667.30 acres, the conveyance of the Wagon Road Company of the 35,534 acres to Miller and the conveyance by the Wagon Road Company to Besse of the 61,143.37 acres, constitute breaches of the restrictive proviso (Bill, R. pp. 10, 11, 19).

The answer admits the transfers, but denies that they were violations (Ans., R. pp. 145, 154).

XI.

Breaches by the Oregon Southern Improvement Company.

The bill charges that the deed of trust by the Oregon Southern Improvement Company to the Boston Safe Deposit and Trust Company was a breach (Bill, R. p. 20).

The answer admits the giving of the deed but denies that it was a breach (Ans., R. p. 155).

XII.

Defendant Company Not in Actual Possession of the Land.

The bill charges that the lands involved are wild, unoccupied and unimproved and that none of them have ever been, or are now, in the possession of the defendant.

The answer, paragraph XIX, admits these statements to be true, but in paragraph XXVI alleges that the defendant is in possession, open and notorious.

The testimony of Armstrong, vice president and manager, Hockett, bookkeeper of defendant company, shows that all the lands were unoccupied and unimproved, except about 693 acres, which were under lease or had been more or less improved by former tenants.

XIII.

Notice Given by the Patents and the Deeds in the Chain of Title.

(a) **The Patents:**

Each patent contains the following:

> *Whereas* by the act of Congress approved March 3, 1869, entitled "An Act granting lands to the State of Oregon to aid in the construction of a military wagon road from the navigable waters of Coos Bay to Roseburg in said State," authority is given to the Coos Bay Military Wagon Road Company to construct a military wagon road in accordance with the said act * * *;
>
> *And whereas,* the State Legislature of Oregon,

by the act of October 22, 1870, designated the said Coos Bay Military Wagon Road Company, the beneficiary of said grant;

And whereas, the said Wagon Road Company has applied for a conveyance of the title to the lands granted by the said Act of March 3, 1869, in conformity with the act approved June 18, 1874. * * *

(b) The Deeds:

The deed from the Coos Bay Wagon Road Company to John Miller, conveying 35,534 acres specifically refers to the act of March 3, 1869, and sets forth its title; the deed from Miller to Huntington, et al, specifically refers to the last mentioned deed; the deeds from Huntington, et al, to Crocker, specifically refer to the deeds from the Wagon Road Company to Miller, and from Miller to Huntington, et al; the deed from Crocker to Beese, specifically refers to the deed from the Wagon Road Company to Miller; the deed from Besse to Russell Gray specifically refers to the deed from the Coos Bay Wagon Road Company to Miller; the deed from Gray to the Oregon Southern Improvment Company specifically refers to the deed from the Wagon Road Company to Miller; the deed from the Coos Bay Wagon Road Company to Beese, conveying 61,143.37 acres, specifically refers to the granting act of March 3, 1869, and the granting act of the Oregon legislature of October 22, 1870; the deed of Besse to the Oregon Southern Improvement Company specifically refers to the Congressional granting act of March 3, 1869, and the State granting act of October 22, 1870. All of these instruments were duly recorded (R. p. 407).

XIV.

The Defendant Had Actual Knowledge of the Terms of the Grant and of the Breaches.

In its answer defendant alleges:

> That before purchasing defendant carefully examined all legislation by Congress and by the State of Oregon affecting the title to said lands and made special inquiry concerning same. * * * That before making said purchase the defendant carefully examined the patents for said lands. * * * (R. p. 168).

TERMS OF THE GRANT WERE UNDERSTOOD BY THE COMMUNITY.

George W. Loggie, manager of the Oregon Southern Improvement Company and the Southern Oregon Company from 1885 until 1892 (R. p. 381), testified that he knew the grant contained the restrictive proviso and this was generally known in the Coos Bay country; that he had heard the matter discussed by business men, as well as those interested in the land; that the restrictive proviso was discussed at various times in his office and he had discussed the matter with Hazzard & Wilson (attorneys for the company) (R. p. 381 et. seq.).

Frank Batter, an employee of the Oregon Southern Improvement Company and Southern Oregon Company, whose duties required him to visit the settlers on the grant lands, testified that all of the settlers knew that the lands had been granted, and the impression was that the settlers were going to get the grant lands for $2.50 an acre, and if they did not the government

would get back the land. Batter, under date of July 26, 1891, reported to the company the contention of a settler on a tract of the grant lands, that the company was required to sell according to the terms of the restrictive proviso (R. p. 386).

George K. Quine, sheriff of Douglas County; 52 years old; has resided in Douglas County all of his life, testified that he had talked to the settlers on the grant lands and it was generally understood among the people that the lands was to be sold under the grant at $2.50 per acre, as provided in the granting act (R. p. 387).

A. T. Siglin, resided in Coos County since 1871, formerly deputy collector of customs, county treasurer and sheriff, testified that it was generally understood "at the commencement of this grant" that the grant restricted the sales of the lands to $2.50 per acre, in quantities of 160 acres to an individual, and anybody who went among the settlers and talked with them could have ascertained that fact.

In between 1888 and 1892, Elijah Smith told him that the settlers claimed that they understood from the Coos Bay Wagon Road Company that they were to get the land they had settled upon for $2.50 an acre, in accordance with the terms of the grant, but that the Southern Oregon Company was an innocent purchaser and was not bound by the original agreement (R. pp. 386-7).

Earl Harlocker, who resided in Coos County since 1871 and worked on the construction of the Coos Bay

Wagon Road, testified that he was acquainted with the settlers in the neighborhood of the wagon road and had talked with them concerning the terms of the grant, and it was always the understanding that the grant limited the quantity of the land that could be sold to each person to 160 acres and the price to $2.50 an acre; that anybody going amongst the settlers and talking with them could have learned that fact (R. p. 389).

G. W. Stevenson, who resided in the vicinity of the Coos Bay Wagon Road since 1871, testified that he had frequently heard the settlers along the road speak of the limitations of the granting act, restricting the sale price to $2.50 an acre and quantity to 160 acres, and any person going among the settlers along the road since 1871 would have learned of these limitations from them if he had talked about the road grant at all (R. p. 390).

J. D. Laird, who had resided on the Coos Bay Wagon Road since 1880, testified that he had heard the settlers along the road discuss the grant, and it was generally understood that the company was to sell the land at $2.50 an acre and in quantities of 160 acres to one person (R. p. 390).

W. R. Murray, who settled on a tract of the grant land in 1886, testified that it was the general understanding in that neighborhood that the company was to sell the grant lands to actual settlers at $2.50 an acre (R. p. 390).

E. P. Mast, who had resided in the Coos Bay

country since 1872 (266), testified that the people had discussed the government requirement that the grant lands be sold at $2.50 an acre, in quantities not to exceed 160 acres to one person ever since he came into the country, and that this was understood by every one (R. p. 248).

G. P. Miller, who had resided in the vicinity of the road since 1874, testified that it was the general understanding among the settlers that the grant restricted the sale price of the land to $2.50 an acre and the quantity to 160 acres to each person (R. p. 391).

J. D. Barker, who settled on a tract of grant lands in 1874, testified that it was the general understanding among the settlers, that the company had to sell the grant lands at $2.50 an acre and in quantities not to exceed 160 acres to each person, and this had always been the understanding in that country and was a subject of conversation among the people (R. p. 392).

M. J. Krantz, who settled on a tract of the grant land in 1884, testified that it was generally understood among the settlers along the road that the company was required to sell the grant lands at $2.50 an acre, in quantities of 160 acres to each person (R. p. 393).

D. C. Krantz, who had lived on his homestead, within four miles of the Coos Bay Wagon Road since 1882, testified that it was always understood that the company was required to sell the grant lands at $2.50 an acre and in quantities of 160 acres to each person, and anybody going among the people and talking with them about the matter would have learned of these limitations in the grant (R. p. 393).

J. L. Crosby, who had resided within the limits of the grant since 1884, testified that it was generally understood among the people, that the company had to sell the grant lands in quantities not greater than 160 acres to a purchaser for $2.50 an acre (R. p. 394).

J. M. Hutson, who resided on a tract of grant land from 1871 to 1879, testified that it was generally understood and talked among the settlers along the wagon road that the grant required the land to be sold for $2.50 an acre, in quantities of 160 acres to each purchaser, and this fact would be learned by anybody going amongst the settlers and talking with them about the matter (R. p. 394).

J. S. Clinton, who had resided in the Coos Bay country since 1884, testified that he had always understood that the grant land was to be sold at $2.50 an acre, in quantities of not more than 160 acres to one person (R. p. 395).

Sarah Haughton, who had resided on a portion of the grant lands since 1874, testified that the settlers along the road generally understood that the company was to sell the grant lands for $2.50 an acre and in quantities of not more than 160 acres to one person, and this matter was discussed years ago (R. p. 399).

J. C. Wilson, resided in the Coos Bay country for 24 years, testified that the terms of the granting act requiring the sales of the lands at $2.50 an acre, in quantities of not more than 160 acres to a purchaser, had been a matter of general conversation among the people during the entire period (R. p. 396).

A. M. Simpson, called by defendant, who had extensively operated saw mills in the vicinity of the grant lands since 1856, testified that he had heard the conditions of the grant discussed in relation to the sale of land in quantities of 160 acres and at price of $2.50 an acre, from the time the wagon road was being constructed. He knew Captain Besse and had seen him at Empire several times (R. p. 396).

T. W. Newland, called by defendant, who had resided in the vicinity of the Coos Bay Wagon Road since 1853, testified he always heard that the company was to sell the grant land at $2.50 an acre, in quantities of 160 acres, and this requirement of the grant was a matter of general conversation among the people, and if a person went along the road and talked with the people about this matter, he would be informed on these requirements (R. p. 224).

A. W. Johnson, called by defendant, testified that he has resided on the Coos Bay Wagon Road since 1889, and that the requirement of the grant, that the lands were to be sold in tracts of 160 acres at not to exceed $2.50 per acre, had been discussed by the people in his neighborhood (R. p. 397).

J. J. Clinkinbeard, called by defendant, testified that he had resided in the vicinity of the Coos Bay Wagon Road since 1880; that it was generally understood that the company should sell a quarter section of land to an individual for $2.50 an acre and anybody going among the people and talking with them would have learned this fact (R. p. 242).

J. A. Haynes, called by defendant, who had resided in the Coos Bay country from 1859 to 1896, testified that, since 1869, the people were familiar with the terms of the grant, that the company should sell at $2.50 an acre in quantities of 160 acres, and that amongst the settlers located along the line of the road this matter was a subject of conversation (R. p. 239).

George Norris, called by defendant, who had resided in the vicinity of the wagon road since 1868, testified that the requirements of the grant that the land was to be sold in quantities not to exceed 160 acres to one person and at $2.50 an acre, was a matter of general talk among the people and anybody going amongst them and talking with them about the grant could have learned these conditions (R. pp. 234-5).

W. W. Halverstott, called by the defendant, who had resided on a tract of grant land since 1873, testified that the requirement of the grant that the land was to be sold for $2.50 an acre, in tracts of 160 acres, was generally understood and talked about along the line of the road and any one endeavoring to discover the status of the land would have learned of this condition if he had gone among these people (R. p. 233).

W. Z. Cotton, called by the defendant, who had resided in the vicinity of the wagon road since 1878, testified that the settlers had discussed the terms of the grant requiring sales of the lands at $2.50 an acre, in quantities of 160 acres, and a person could have learned these conditions by talking with the settlers along the road (R. p. 226).

S. A. Lawhorn, called by the defendant, testified

that when he came to Oregon in 1870 he heard that a grant had been made to construct a wagon road from Roseburg to Coos Bay and that the land was to be sold at not to exceed $2.50 an acre, in quantities not exceeding 160 acres. Witness had resided in the vicinity of the grant lands since 1871 (R. p. 232).

J. D. Benham, called by the defendant, who had lived in the vicinity of the wagon road since 1875, testified that the requirements of the grant as to sale of the land at $2.50 an acre, in quantities of 160 acres, had been a matter of conversation among the people along the road and a person talking with them could have learned these facts (R. p. 230).

I. E. Rose, called by the defendant, who resided within the limits of the grant from 1887 to 1898, testified that he was acquainted with the conditions of the restrictive proviso and anybody who went amongst the people along the road and talked with them would have learned that the grant required that the land be sold at $2.50 an acre, in quantities not to exceed 160 acres (R. p. 241).

J. P. Stemler, called by the defendant, had heard the restrictive proviso mentioned and also read in the papers that the lands had to be sold at $2.50 an acre, in tracts of 160 acres (R. p. 225).

J. A. Yoakam, called by the defendant, was employed by the Oregon Southern Improvement Company from 1883 to 1885 and attended to the field work for the company dealing with the settlers; denied ever having heard of the restrictive provisions in the grant,

or that the settlers along the road ever made mention of or claimed under this proviso, and though he resided in the Coos Bay country in the vicinity of the wagon road grant until 1896, he never heard of these conditions in the grant until 1914. Concerning his dealings with settlers on the grant lands he reported sometimes to Elijah Smith (R. p. 279).

S. A. Gurney, called by the defendant, had resided in Douglas County, in the vicinity of the wagon road, during his entire life of 52 years, testified that he had never heard of the restrictive proviso until after this suit was instituted.

W. H. Coats, called by the defendant, who had lived in the vicinity of the wagon road in Douglas County since 1861, testified that he had heard people mention that the grant of land was to be sold at $2.50 an acre, but never heard of any limitations as to quantity (R. p. 245).

John F. Hall, called by defendant, who had resided in Coos County in the vicinity of the Coos Bay Wagon Road since 1869, testified that he had never heard much discussion of the terms of the grant and first heard the question as to the sale price of the land being $2.50 an acre, discussed about eight or nine years ago (R. p. 227).

William Bettis, called by defendant, who had resided within the limits of the grant since 1874, testified he first heard of the restrictive proviso about 1900 (R. p. 237).

Thirty-six witnesses testified on this point, twenty-nine to the effect that the terms of the grant were well known to the community, and that no one could go amongst the settlers or discuss the matter of the grant without learning of its terms, and that the settlers believed it the duty of the owner of the lands to sell them in tracts not to exceed 160 acres to one person, and at a price not exceeding $2.50 an acre; one said that he had heard but one person speak of the terms, another that he had not heard much discussion of the terms, and three, that they had never heard of the matter at all.

In view of the foregoing testimony, it would seem that the officers of the Oregon Southern Improvement Company, and of the Southern Oregon Company, should have known before they purchased, that the Wagon Road Company had no right to make the deeds, two to Miller and one to Besse, or at least, that the title was questioned by the people, yet, they urge that they did not know at that time that the soundness of the title was doubted by anyone.

XV.

The Land Could Have Been Sold in 160-Acre Tracts.

George W. Loggie, former manager of the Oregon Southern Improvement Company, testified that on going among the settlers they informed him when they went on the land Dr. Hamilton promised to give them title at $2.50 an acre; a number of people came to the office of the Oregon Southern Improvement Company, and later, the Southern Oregon Company and asked if they

were to get their lands for $2.50 an acre as promised by Dr. Hamilton, and to these people he replied, he was not authorized to sell; while he was with the company from 1885 until 1892, there was not much demand for timber land or for lands along the mountains that were rocky, gravelly and precipitous; from correspondence and conversations with Elijah Smith, he learned he was not to sell any of the property of the company; he reported to Elijah Smith the arrangements that the settlers represented they had with Dr. Hamilton; he was instructed by Elijah Smith to eject the settlers from the grant lands, and, for the purpose of obtaining recognition of the company's title had the settlers sign applications to purchase, and afterwards, collected rentals from them; from statements of the settlers they were willing to pay $2.50 an acre for the land; in his opinion the company could have sold quite a lot of the bottom lands which was not heavily timbered, for farming purposes (R. p. 381).

Frank Batter, employed by both the Oregon Southern Improvement Company and the Southern Oregon Company, as a field man, testified that in company with Elijah Smith he visited the settlers. He had personally negotiated with the settlers with reference to the grant land they occupied, but had no authority to sell lands and the company never offered to sell lands to anybody; extracts from reports made to the company officials by Batter show willingness on the part of settlers to purchase the grant land in accordance with the terms of the restrictive proviso; a settlement was made with some of these men, but the others were unable to get the land they had settled upon (R. p. 386).

C. T. McKnight, an attorney of Coos County, Oregon, testified to having presented 212 applications of persons who desired to purchase tracts of the grant lands in quantities of 160 acres at $2.50 an acre; the Southern Oregon Company refused to recognize these applicants, although they were ready to purchase (R. pp. 333-5).

N. Osmundson, deputy county clerk of Coos County, Oregon, testified that there were recorded between 1907 and 1908, in his office, 448 applications to purchase grant lands, practically all of the applications were acknowledged before George Watkins, and were filed by him (R. p. 397).

George Watkins testified to having presented 200 or 300 applications for the purchase of tracts of the grant land, each applicant applying for 160 acres at $2.50 an acre, to the Southern Oregon Company; accompanying each application was a tender of purchase price; all of these applications were rejected by the company (R. p. 322 et. seq.).

Watkins, as a matter of fact, presented 448, the number which Osmundson said had been filed, for none of the McKnight applications were filed. Therefore, the total number of applicants through McKnight and Watkins is 660.

James S. Howard testified that in 1874 a great portion of the grant was of no value for settlement purposes, only the narrow valleys along the road, and at that time the timber on the grant was not considered of much value, but later it became the chief value of the land.

Isaac Taylor Weekly testified Dr. Hamilton informed him that the grant land would be sold to settlers at $2.50 an acre and the settlers were told the same thing; these settlers did not get the land they had settled upon; all of the bottom land was taken up in 1887; at this time timber was considered worthless, and heavily timbered lands in the mountains was not taken up in those early days and it could not be sold; near his home there is quite a lot of unsold grant land that would make good homes (R. p. 397).

John Fitzgerald testified that a settler could make a living on 160 acres of the hill land within the grant and mentioned settlers who had established and maintained homes on such lands (R. p. 398).

Earl Harlocker testified that there was no demand for timber land in the mountains between 1871 and 1880, except by settlers who desired it for farming purposes, but the Coos Bay Wagon Road Company *would* not sell it; the demand for timber land began in 1891 (R. p. 389).

W. R. Murray testified that he settled on a tract of the grant lands in 1886, improved it with a house and barn and the ordinary improvements that are placed on a farm, then applied to the president of the company to purchase the land and received a reply that the land was not on the market; in his application to purchase he mentioned no price; in 1887, George Loggie, manager of the Southern Oregon Company, came to this place and ordered him to leave the land, he, desiring it for a home, offered to buy it from Loggie; Loggie told him the land was not for sale; in pursuance to Loggie's

orders he left the place and abandoned his improvements; the company never offered to lease him this land, and it remains unoccupied (R. p. 390).

G. P. Miller testified to unsuccessful efforts made by his father to purchase 160 acres of the grant lands which he had settled upon, from both the Coos Bay Wagon Road Company and the Oregon Southern Improvement Company; also, that as early as 1875 there were quite a few settlers on the grant land who were unable to purchase because the land was not on the market (R. p. 391).

J. L. Barker testified that he settled on a tract of the grant land in 1874, and was told by Dr. Hamilton that the company was not permitted to charge more than $2.50 an acre for the land; relying on this statement he made improvements on the place worth $600 or $700 and later applied to Dr. Hamilton to purchase it, but was informed that the land was involved in a law suit; he subsequently unsuccessfully applied to Metcalf and Yoakam to purchase this land; in 1892 he explained to Elijah Smith the understanding he had received from Dr. Hamilton, but was never able to purchase the land; he was willing to pay $2.50 an acre for the land; he finally leased the land from the company; the Wagon Road Company sold land at one time, but later did not (R. p. 392).

M. J. Krantz testified that he settled on a tract of the land in 1882, being encouraged so to do by Dr. Hamilton; he made unsuccessful efforts to purchase this land both from Dr. Hamilton and subsequently Elijah Smith, and from the latter he received the reply that the company could not dispose of the land; he was

willing to purchase at $2.50 an acre; he left the land after residing on it for about 14 years and making improvements worth $4,000 (R. p. 393).

J. L. Crosby testified that about 1884 his father settled on a quarter section of the grant land and attempted to purchase it from the Oregon Southern Improvement Company, offering $2.50 an acre, but his application was rejected, the company stating that they were not ready to sell; his father placed improvements upon this land worth at least $1,000 and finally moved away as there was no prospect of being able to purchase; after his father left, witness remained on this land and unsuccessfully attempted to purchase it, and finally, being given to understand that he could not purchase the land, he entered into a lease with the company (R. p. 394).

J. A. Cotton testified that about 1906 he settled on a small tract of the grant land and made improvements worth about $300 (414); the following year he applied to Elijah Smith to purchase the land and was informed that the land was off the market; in 1912 was informed by Mr. Armstrong that when the land was on the market he would be given a chance to purchase; and now leases the place for $25 a year (R. p. 226).

W. F. Burton testified that he had settled on 160 acres of the grant land in 1880, being told, prior to the settlement, that the land would be sold in tracts of 160 acres at $2.50 an acre; afterwards, the Oregon Southern Improvement Company offered to sell him the land at $10 an acre for bottom land and $5 an acre for hill land; he replied to this offer that he understood the land was to be sold for $2.50; he purchased 53 acres for $200;

later he unsuccessfully made application to purchase 9 acres of land from the company; the mountain lands in the grant that are heavily timbered, high, precipitous and rocky he did not think could be sold between 1875 and 1880, but had no experience in selling land (R. p. 398).

J. D. Laird testified that the timbered lands in the mountains was not worth much after the timber was removed, though some of it might be used for range. Farm land in the community in which he lives is worth about $200.00 an acre (R. p. 399).

E. P. Mast testified that he settled upon a tract of the grant land in 1873, and in 1875 applied to Dr. Hamilton to purchase it, but was informed that the land could not be sold at that time; later, Metcalf of the Southern Oregon Improvement Company proposed to sell the land upon which people had made improvements, at an appraised value, but most of the people were afraid of the title so few of them purchased the land; witness purchased the land he had settled upon at $3 an acre. The mountain and hill land, so far as witness knew, could not be sold in 1872 in tracts of 160 acres, but he knew of no efforts of the Coos Bay Wagon Road Company to sell the land (R. p. 248).

J. M. Hutson testified that in 1871 he settled on 160 acres of the grant land and later applied to Dr. Hamilton to purchase it, but was informed that the company was not ready to sell (163-164), but that the company was required to sell the land for not more than $2.50 an acre; relying upon these statements he made improvements on the land worth $1,000, but left the place

in 1879 because the company would not sell to him, the reasons stated always being that the patents had not been issued, or something of that nature; all of his dealings were with Dr. Hamilton; other people who settled on grant land had the same experience as himself (R. p. 394).

J. S. Clinton testified that he settled on a small tract of the grant land in 1905 and attempted to purchase this land from the Southern Oregon Improvement Company at $2.50 an acre, but Elijah Smith refused to sell; prior to applying to purchase he leased this land from the company. W. H. Harmon, in his presence, also applied to purchase a small tract of this land and was also refused by Elijah Smith (R. p. 395).

A. J. Radabaugh testified that in 1885 he and his brother applied, each, for 80 acres of the grant land, offering $2.50 an acre, and this application was refused by the Oregon Southern Improvement Company, who offered them the land at $3 an acre; he now has 80 acres of this land leased at $10 a year. Witness mentioned several witnesses residing on mountain land as early as 1875, and stated, in his vicinity, the mountain land was now all taken up (R. p. 399).

Sarah Haughton testified that she, with her husband, now dead, settled on a tract of the grant land in 1874, and after putting improvements on it her husband endeavored to purchase the land of Dr. Hamilton, but was informed that the company would not sell the grant land in small tracts, desiring to keep it intact and sell the whole. Her husband desired to purchase 160 acres, and had the means to pay for it; they had built a com-

fortable home on the place and used about 30 acres of the land for agricultural purposes and made their living for themselves and seven children from the land. After this her husband made efforts to purchase from the successors of the Coos Bay Wagon Road Company and was ready to pay $2.50 an acre for it. About 1894 the Southern Oregon Improvement Company brought suit to eject them from the land, and as a result, the sheriff came to their place and cut through their house as shown in photographs. Prior to this time, Shine, the manager of the company, told her husband that the company wanted to keep the land intact and did not want to sell it in small tracts (R. p. 399).

J. C. Wilson testified that he had been attempting for the last 24 years to purchase 160 acres of the grant land; at one time made application to Shine, manager of the company, for 160 acres, offering $2.50 an acre; Shine replied that the company had no land to sell; he offered to settle on the land and was informed he would be a trespasser; made another application to purchase another 160 acres, offering $4 an acre and received the same reply as he did to his first application; the land he first applied to purchase was fine agricultural land (R. p. 396).

A. T. Siglin testified that the boom in timber commenced about 1900, but prior to that time any good timber that could be logged into the Coquille River or tide water was in demand.

He also said, that if the different companies, including the Wagon Road Company and the defendant, had been willing to sell the land within the terms of the

grant it could have been readily disposed of, or at least the greater portion of it; that some years ago he knew that people along the road were willing and anxious to purchase (R. p. 387).

Robert E. Shine, formerly manager of the Southern Oregon Improvement Company, called by the defendant, testified there was no demand for mountain timber lands for some years subsequent to 1888, and about 1900, when eastern buyers appeared, timber values became attached to the lands. At the time he went into the employ of the company (in 1888) the timber lands *on the mountains* could not be sold in 160-acre tracts to anybody at any price. *The reason Elijah Smith did not sell timber land was because he decided to keep the tract until they were prepared to operate it themselves.* A great many people sent applications to purchase a small piece of the grant land generally adjoining their home farm; the company would reply that when it was ready to sell the applications would be considered. Several applications were made by people who subsequently leased. Under instructions from Elijah Smith, he told applicants to purchase the lands, that the company was not selling; applications to purchase grant land was made to Elijah Smith and were rejected by him (R. p. 294).

Note:—It will be observed that his statement that lands could not be sold in 160-acre tracts, refers to mountain lands.

J. A. Yoakum, formerly an employe of the Oregon Southern Improvement Company from 1883 to 1885, called by the defendant, testified that in his interviews

with settlers on the grant lands, they informed him of the promise of Dr. Hamilton that they would get the land they had settled on, but none of them mentioned the price; his instructions were to sell to the purchasers who desired to purchase it at such a price as was proper in his judgment; the company had a general charge of $10 an acre for bottom land and $3 an acre for hill land in 1885. At the time he worked for the company the timber land had no value except along the rivers and creeks; rocky timbered hillside land situated a mile and a half from sloughs and water during this period could not be sold for $2.50 an acre in 160-acre tracts or for any sum or in any quantity, as a person could get unsurveyed government land for nothing (R. p. 279).

Note:—Unsurveyed government land was not on the market for any price.

Herbert Armstrong, called by the defendant, vice-president and manager of the Southern Oregon Company since 1911, testified he had received a good many applications to purchase bottom lands (R. p. 299).

T. J. Thrift, assessor of Coos County, called by defendant, testified that he had been in the assessor's office for 16 years and during the first years of his work in this office *timber* lands were considered almost absolutely worthless. The first timber operations and demand for timber started in that country about 1900; since that time the timber land has become valuable. The grant lands are largely timber lands and more valuable for timber than for any other purpose (R. p. 229).

A. M. Simpson, called by the defendant, testified that from 1869 to 1875 the timber on the mountain sides had no value except for speculative purposes at $1 to $3 an acre, according to the quality, and *mountain* land in 160-acre tracts during these years could be sold only to speculators (R. p. 396).

T. W. Newland, called by the defendant, testified that he was acquainted with the grant lands from Roseburg to the top of the Coast Range, and in 1873 all the land that was not occupied was of poor quality and he did not think the grant land could be sold between 1869 and 1870 in tracts of 160 acres, because he never heard of anybody wanting it or offering anything for it. *Witness had resided,* and *raised* a *family* on his *farm, within the limits of the grant, since* 1875 (R. p. 224).

S. A. Gurney, called by the defendant, testified that between 1869 and 1876 he did not think any of the *rocky, hilly* land could be sold to anybody in tracts of 160 acres at any price, except a small piece adjoining land owned by individuals. Witness was a farmer and had resided within the limits of the grant since 1853. The timber excitement began about 1900 and all of the contiguous government land was then entered (R. p. 244).

W. H. Coats, who had resided within the limits of the grant since 1861, called by the defendant, estimated that one-tenth of the grant land now owned by the defendant was suitable for settlement purposes, and that nine-tenths could not have been sold at any price in 160-acre tracts between the years 1859 and 1879, but

said he had nothing to do with the sale of the wagon road lands, and did not know whether the company had applications to purchase (R. p. 245).

J. J. Clinkinbeard, called by the defendant, testified that the Coos Bay Wagon Road Company was selling land in 1875, but took the land off the market about that time and sold no more. He understood the land was taken off the market and that neither the Coos Bay Wagon Road Company, the Oregon Southern Improvement Company or the Southern Oregon Company had offered the land for sale. He had heard men say that they wanted to buy grant lands but were unable to, and it was generally understood that the land was not on the market. He never heard of any demand for *hill* timber land in 160-acre tracts between 1875 and 1880 or of anybody purchasing such lands during this period (R. p. 242).

L. D. Smith, called by the defendant, testified that barren or *timbered* hill lands could not be sold prior to 1875 at any price. The first demand for timber was in the summer of 1883, and *after this* a *lively* demand developed for timber (R. p. 228).

A. E. Bushnell, called by the defendant, resided within the limits of the grant in Douglas County since 1859, testified that the grant lands could not be sold in 160-acre tracts at any price in 1869. The government timber lands were not entered until within the last 12 or 15 years. He knew very little about the timber business or whether the Southern Oregon Company had attempted to sell, or whether anybody had attempted to purchase the timbered land (R. p. 248).

A. W. Johnson, called by the defendant, had been acquainted with the lands in Township 28 S., R. 8 W., since 1889, testified this land had never been settled upon and but very little of the government land taken up. There seemed to have been no demand for the grant land in tracts of 160 acres prior to the timber excitement in 1900. He was not connected with any of the companies; did not know whether they had received applications to purchase, and for aught that he knew the reason the land was not sold was because the owners did not want to dispose of it (R. p. 398).

John F. Hall, called by the defendant, who had resided in Coos County since 1869, testified that there was no demand for timber in the Coos Bay country except that adjacent to tide water between the years 1870 and 1880 and he did not think the *mountain* land could have been sold during this period at any price. The first flurry in timber was in 1883. After the lands were transferred to the Oregon Southern Improvement Company there were a number of people who wanted to purchase and were willing to pay $2.50 an acre, but were unable to get the land (R. p. 227).

I. E. Rose, called by the defendant, testified there was no demand for timber in 1877 and that the timber land embraced in the grant could not be sold at that time to anybody in quarter sections. He did not know the lands had been withdrawn from sale by the Coos Bay Wagon Road Company. There was considerable feeling against the Coos Bay Wagon Road Company for not selling the land; settlers had built little homes and had cleared tracts of land where they made their

living and their homes; a good many of these men were never able to get these lands (R. p. 241).

J. A. Haynes, called by the defendant, testified that from the date of the construction of the road, for about 10 years, there was no demand for *mountain* timber lands and he did not think such lands could be sold in tracts of 160 acres or less, for cash, during this period and lands of the character were not taken up during this period. He purchased 160 acres of the grant land in 1873 for $1.25 an acre, which he resided upon and cultivated. Ever since this purchase the lands have been out of the market, and the Coos Bay Wagon Road Company and its successors have absolutely refused to sell any of the land (R. p. 239).

J. P. Stemler, called by the defendant, testified that there was no demand for timber in the Coos Bay country in 1885, and it was then considered a nuisance, and at that time *mountain* timber land could not be sold in 160-acre or smaller tracts. He had never attempted to sell any of such land except during the last three or four years. The first demand for timber in that country was about 1900 (R. p. 225).

William Bettis, called by the defendant, testified there was no demand for *hill* timbered lands in the Fairview district along the wagon road between 1874 and 1880, and he did not think the *timber* land in the grant could be sold in tracts of 160 acres or less, for money, during that period. The demand for timber started about 1900. He never had anything to do with selling land for the Wagon Road Company, and knows nothing about applications to purchase the land except

within the last few years. Shortly after 1874, the Coos Bay Wagon Road Company took the grant lands off the market; the reason he knew this was that there were other wagon road lands in his neighborhood, and people came into the country, and if the land had been on the market there would have been neighbors settled close to them, and this impressed the matter on his mind. He knew the Coos Bay Wagon Road Company did not sell the land to anybody after its withdrawal from sale, and the policy of the other owners of the land has been the same; with the exception of a few tracts no sales have been made since that time, either by the Wagon Road Company or its successors (R. p. 236).

George Norris, called by the defendant, testified that from the time he went into the country (1868) until 1880, there was no demand for timber land and he did not think the timber lands on the *hills* could be sold in 160-acre tracts during this period. He had heard of people trying to buy some of the grant lands they had settled upon situated along the river creeks and bottoms, but were *unable* to get it. He had nothing to do with the sale of the grant lands and knew nothing about the applications that might have been made to the company for the land (R. p. 234).

W. W. Halverstott, called by the defendant, testified he purchased a quarter section of the grant land at $2 an acre in 1873; there was no demand for *timber* be-between 1873 and 1880 that he knew of; he knew of no sale of *mountain* timber lands in tracts of 160 acres between 1873 and 1880. Upon the land he purchased from the company he raised a family of six children (R. p. 232).

L. A. Lawhorn, called by the defendant, testified that from 1871 to 1880 he knew of no lands being taken up on the *hills* except in connection with bottom lands; from 1871 to 1878 there was no demand for *timber* land and no market for timber, and during these years he did not think the timbered grant lands upon the *hills* could be sold in 160-acre tracts for any sum. The timber excitement began in that country about 1900 (R. p. 231).

J. D. Benham, called by the defendant, testified that when he moved into the limits of the grant in Coos County in 1875, there was no demand for *timber* and at that time the timber lands in the *hills* could not be sold for cash. He had never been engaged in selling timber, his occupation being that of a farmer. He knew of several parties who wanted to buy grant land, one of whom succeeded and the remainder did not, but he did not know the reason (R. p. 230).

A number of photographs were introduced by the government for the purpose of showing that settlers on the wagon road land had made substantial improvements, and had built for themselves comfortable homes (Govt. Ex. 3-4-5-12-14-15-16-17-18-19-20-21-36, R. p. 529).

A. M. Simpson testified that in 1910 he purchased a section of the grant lands (Sec. 23, Twp. 26 S., R. 12, West), for which he paid $19,000 (R. p. 396).

Plats introduced in evidence, by defendant, showing the disposition of public lands within the grant (Deft. Ex. 1 to 14 inc., R. p. 315), and a certificate from the State Land Board (Deft. Ex. 177, R. p. 537), setting

forth the disposition of school lands within the limits of the grant, show a constantly increasing demand for lands in small tracts since and prior to the granting act.

The fair deduction from all the foregoing testimony is, that the Wagon Road Company took the land off the market and refused to sell, and that this in general was the policy of the Oregon Southern Improvement Company and the Southern Oregon Company; also, that if the different companies had been willing to sell they could have disposed of a very large part of the land.

XVI.

The Character of the Land.

Considerable testimony was introduced by the defendant upon the character of the land for the purpose of showing that it was impossible to make sales of the land within the terms of the restrictive proviso. The government objected to it all upon the ground that it was immaterial and irrelevant. These objections we still insist upon. Not knowing what the ruling of the court would be upon the objections, the government called, in rebuttal, a number of witnesses upon the same subject. We give below an abstract of the testimony of the witnesses called by both parties.

George W. Loggie, manager of the company from 1885 until 1892, testified that he had examined the grant lands sufficiently to become familiar with their general character; in his opinion 60 per cent of the land of the company could be cultivated after it was cleared, and

15 per cent could be cultivated in its natural condition; estimated the cost of clearing the timbered land from $60 to $100 an acre. Had experience in clearing land (R. pp. 381-2).

Almon S. Buell, residing near the Coos Bay Wagon Road in Douglas County from 1870 to 1887, testified that when cleared the bottom land would make fine agricultural land and the mountain land could be used for grazing (R. p. 400).

A. T. Siglin, a resident of Coos County since 1871, formerly Deputy Collector of Customs, County Treasurer and Sheriff, testified that he had been over the different parts of the land and estimated that 90 per cent of the land was susceptible to tillage and fruit raising, and that 10 per cent of the lands were worthless. In his estimate he included lands that could be utilized after clearing (R. p. 387).

Earl Harlocker had resided in Coos County since 1871 and had been Statistical Correspondent for the United States Agricultural Department for 30 years and had classified the lands of Coos County, testified that 90 per cent of the grant lands were tillable after clearing, and he had so reported to the government, and 10 per cent was barren. In the present condition, witness estimated that only 5 per cent of the land could be cultivated, but this is so, he said, because you cannot cultivate until you clear the brush (R. p. 389).

J. D. Laird, who had resided on the wagon road since 1880, testified that the land on the *mountains* in the timbered area was not worth much after the timber

was removed, but some of it might be used for range (R. p. 398).

Isaac Taylor Weekly, an old resident within the limits of the grant, testified that there was quite a lot of unsold lands near his residence that would make good homes (R. p. 397).

W. R. Murray, who had resided within the limits of the grant since 1886, estimated that 75 per cent of the grant lands could be used for pasture and farming after clearing (R. p. 391).

G. P. Miller, who had resided within the limits of the grant from 1874 to 1895, testified that one-fifth of the grant in Coos County was good farm land, and the remainder would make fine grazing land after the timber was removed; a portion of the land which could not be farmed would be suitable for fruit raising (R. p. 392).

J. L. Barker, who had resided within the limits of the grant in Coos County since 1874, testified that some of the timber land could be cultivated, but was unable to say what percentage was bottom and what percentage was hill land (R. p. 392).

W. F. Burton, who has resided within the limits of the grant since 1879, testified that he was acquainted with the lands over the *mountains* and that they were heavily timbered, high, precipitous and rocky (R. p. 398).

J. M. Hutson resided on the grant land from 1871 until 1879, testified that the hill land within the limits of the grant, in his vicinity, could be used for pasture after the removal of the timber (R. p. 395).

J. A. Yoakum, employed by the Oregon Southern Improvement Company from 1883 to 1885, called by the defendant, testified that he had been over the lands of the Coos Bay Wagon Road Company in dealing with the settlers; about 3 per cent of the land was bottom land and the remainder of the grant was composed of burned off land worth nothing; some good timber land; some rocky land and some moderately good land. He estimated the cost of clearing the bottom land at $50 an acre and the hill land at $250 an acre (R. p. 279).

T. J. Thrift, called by the defendant, County Assessor of Coos County for the past 12 years, testified that 90 per cent of the grant lands could be rendered tillable by clearing (R. p. 229).

S. A. Gurney, called by the defendant, resided in Douglas County within the limits of the grants 52 years, testified that he was acquainted with the grant land between Roseburg and the top of the Coast Range, and not more than one-tenth of the area within the place limits could be cultivated, excluding Looking Glass and Flournoy Valleys, and the other nine-tenths, assessed as grazing land, is brushy and rocky with some scattering timber (R. p. 243).

W. H. Coats, who had resided in Douglas County within the limits of the grant since 1861, called by the defendant, testified that he was familiar with the grant lands on the south side of the road from Roseburg to summit of the Coast Range, and of the unsold grant lands one-tenth is suitable for grazing, and very little of this could be cultivated, and nine-tenths was rocky and covered with timber and brush, not suitable for

settlement purposes (551), and not of much value (R. p. 244).

J. A. Cotton, called by defendant, testified that he did not know the boundaries of the grant and had never seen the grant. When asked what proportion of certain land described to him was bottom land, he replied, "Pretty hard question to answer. I could not say what it was, possibly one-twentieth" (R. p. 225).

A. E. Bushnell, called by the defendant, has resided within the limits of the grant since 1859, testified that he was familiar with the lands within the place limits of the grant from Roseburg to the top of the Coast Range, and that the tillable land would average about one acre to a section; the remainder of the land would be rough, hilly and of no use for any purpose. Though there was some timber on the land it was not sufficient to make it valuable. The worthless lands of the grant extend from Reston to Brewster Valley, a distance of 14 miles (R. p. 245). The road is about 65 miles long.

A. W. Johnson, called by the defendant, who has resided along the wagon road in Douglas County since 1889, testified that he was acquainted with the grant lands in Township 28 S., R. 8 W., commencing at the foot of Sugar Pine mountain and extending to the top of the Coast Range; all this land being in a mountainous, rough country, was covered with brush and timber and very heavy, and it has very little grass growing on it (R. p. 397).

J. J. Clinkinbeard, called by the defendant, testified that 10 per cent of the grant lands was bottom land

and the remainder timber lands, the latter being quite broken in some places and very rocky; the greater portion is free from rocks (R. p. 241).

L. D. Smith, called by the defendant, had lived within the limits of the grant in Coos County since 1865; he had been over the wagon road a good many times and over a portion of the lands embraced within the limits of the grant; had never made an examination of the land for the purpose of classifying its character; the grant was composed of bottom, hilly, rocky and timber land; the portion of the bottom land, which is good land, is so small that he could not make a guess as to what it was, and it was found only along the creeks (R. p. 227).

I. E. Rose, called by the defendant, who resided within the limits of the grant from 1877 to 1889, testified that very little of the land was bottom land and the remainder was hill land, some of it precipitous and broken (R. p. 240).

J. P. Stemler, called by the defendant, had resided within the limits of the grant since 1885, testified that from Dora (Coos County) to the 18 mile house in Douglas County there was very little bottom land within the limits of the grant, and the country was rough, hilly and broken. Only knowledge of lands gained from traveling over roads from which not very much of land could be seen (R. p. 224).

Wm. Bettis, called by the defendant, had resided within the limits of the grant since 1864, testified that a small portion of the grant was bottom land, and a

good portion of it was timber land, a portion of it carried no merchantable timber. Never examined lands of grant for purpose of determining their character (R. p. 237).

George Norris, called by the defendant, resided within the limits of the grant in Coos County since 1868, estimated that 75 per cent of the grant was hill and timber land; the hill land was sloping with small level benches covered with timber in some places; a great deal of the land adjacent to the bottom land could be used for grazing if cleared; the bottom land is very desirable (R. p. 234).

W. W. Halverstott, called by the defendant, resided within the limits of the grant since 1873, testified that but a very small portion of the grant he had been over was bottom or bench land and the remainder was hill land covered with more or less timber; his knowledge was gained from travel over the road between Roseburg and Marshfield; in many places along the road he could see only a few rods away; he had been over very little of the land (R. p. 232).

L. A. Lawhorn, called by the defendant, has lived within the limits of the grant in Coos County since 1871, estimated that one-fourth of the grant within the place limits was bottom land, nearly all of which was taken up in the early days; in addition to the hill and bottom land there is some bench land within the limits of the grant which is good for grazing, but not staple crops; a very small portion of the hill land if cleared would be tillable (R. p. 231).

Defendant offered in evidence reports on timber cruises covering unsold grant lands in Douglas County, based upon examinations made since the institution of this suit by George Gothro while an employe of defendant; also reports of cruises of unsold grant lands situated in Coos County, based upon cruises made under the direction of the officials of Coos County for tax assessment purposes.

A summary of these exhibits is as follows:

GOTHRO CRUISES OF GRANT LANDS IN DOUGLAS COUNTY.

Grazing	11,934 acres
Sheep range	832 "
Cultivation	1,122 "
Part cultivation	975 "
Not classified	1,760 "
Total	16,623 acres
In bill not cruised	1,760 acres
Timber	293,416,000 feet

(Deft. Exs. 15 to 52, 178, 180 to 189; R. pp. 536-7).

COUNTY CRUISE OF GRANT LANDS IN COOS COUNTY.

Grazing	27,860 acres
Poor grazing	5,780 "
Cultivation	14,980 "
Part cultivation	12,330 "
Agricultural	1,320 "
Part agricultural	200 "
No value	3,120 "
Little value	4,280 "
Total	69,870 acres

In bill not cruised	4,660 acres
Total	74,530 acres
Timber	2,065,665,000 feet
Total cruised in bill (Coos)	16,623 acres
" " " " (Douglas)	69,870 acres
Total	86,493 acres
Total timber	2,359,081,000 feet

(Deft. Exs. 53 to 176; R. p. 536).

Nearly all the witnesses, called by the defendant, upon the character of the land, knew nothing about it except what they learned as they passed along the road or in occasional hunting trips over it. Against their testimony, consider the cruises made by men who traveled over every quarter section at least. Even the cruise made by Mr. Gothro, an employe of the company, makes a better showing for the cultivable character of the land than the testimony of defendant's non-cruiser witnesses.

XVII.

The Contention of the Defendant That the Restrictive Proviso is not Applicable, Because of the Character of the Land, is not Supported by the Testimony.

Congress inserted the proviso, knowing the character of the land.

The bill which finally became the granting act of March 3, 1869, was introduced in the Senate by Senator Williams of Oregon. Upon consideration in the Senate debate was had as follows:

I have a map here, and can exhibit the condition of the country and the situation of the points referred to if the Senator desires to look at it; but I will state to the Senator that Roseburg is the county seat of Douglas County, and the chief town of the Umpqua Valley. It is surrounded on all sides by mountains. This bill proposes to assist in the construction of a road from Roseburg to the navigable waters of Coos Bay through the Coast Range of mountains, so that there may be access to the ocean from Roseburg through the mountains. It is a very difficult and expensive road to construct, and it is very necessary to the people that they should have this way of egress and ingress. The distance is a little more than fifty or sixty miles.

There are *some small valleys* in the mountains in *which* the land *may* be worth *something*, and it is possible that there may be some timber on the mountains that may be used by the state in the construction of this road with advantage. * * * (Italics mine).

Mr. Hendricks said:

* * * The road will be a costly one to build and the *lands* for a very *considerable* distance in the mountains will *not be* of *value*. * * * It (the road) will be mainly through a region of country that is not now inhabited, and that it will be *difficult* to *settle* perhaps, but it will connect a desirable part of the country with the coast.
The bill passed (second session of the fortieth

Congress, Cong. Globe, pp. 249-250).

In the House of Representatives Mr. Julian moved this amendment:

> Provided, that the grant of lands hereby made shall be upon the condition that the lands shall be sold to *actual settlers* only in quantities not greater than one quarter section and for a price not exceeding $2.50 per acre (Italics mine).

Mr. Mallory, Congressman from Oregon (a member of the law firm representing the Oregon Southern Improvement Company and Southern Oregon Company from their organization down to his death a few months ago) (Id. 1074), remarked:

> I am sure that if the House understood this bill there would be no objection to it. Those who are acquainted with the geography of the State of Oregon know that along the line of the coast there is a high range of mountains known as the Coast Range. Between that range of mountains and the Cascade Mountains there is a succession of valleys. * * * *A large portion of the land proposed to be granted is not worth anything.* Most of it lies on this range of mountains and *could not be sold for one cent an acre.* Some of it may be valuable in the construction of this road. * * *
>
> In the valley of the Umpqua there is a considerable settlement, and at the Coos River, on the coast, there is another settlement; but along the line extending about sixty miles it is an *unbroken wilderness.* * * *
>
> The grant is made to the State of Oregon, and it is to be controlled by the Legislature. I have *no objection* to the amendment offered by the gentleman from Indiana (Italics mine).

Mr. Julian, with the consent of the House, modified his amendment by adding after the words "a quarter section" the words "to each person," and the amend-

ment as modified was passed (second session, fortieth Congress, Cong. Globe, pp. 1820-1821).

The bill was returned to the Senate; but the House amendment, as laid before it, did not contain the words "actual settlers." How they came to be dropped is not disclosed by the record, but Mr. Julian's amendment, with the exception of these two words, was adopted and the bill became a law.

XVIII.

The Defense of Res Judicata is Untenable.

According to the answer there were two suits commenced on February 29, 1896, one on August 25, 1897, and one on February 18, 1896. These suits are numbered, respectively, 2284, 2283, 2406 and 2278 (Deft. Exs. 240-1-2-3; R. pp. 410 et. seq.).

No. 2284 involved 30,044 acres of land and was based upon the theory that the lands were outside of the grant limits and had therefore been erroneously patented to the Wagon Road Company.

A demurrer to the bill was sustained and the action dismissed. There is nothing in the record of the case to show upon what ground the court rested its decision.

An official communication from the District Attorney May 21, 1897, to the Attorney General, states "the demurrer has been argued and the court has sustained the same, holding that the United States were in no wise interested in this matter; that the real party at interest was the Oregon and California Railroad Com-

pany, the prior claimant, and that the suit should be brought in the name of the Oregon and California Railroad Company; that if the government were to recover in the present litigation it would gain nothing thereby, and lands patented to the Coos Bay Wagon Road Company by the terms of the grant to the Oregon and California Railroad Company would immediately go to said latter company in case the government was successful in this litigation'' (Govt. Ex. 86, R. p. 437).

Suit No. 2283 covered the same land as suit 2406. To defendant's answer, complainant filed a replication, to which defendants demurred; the demurrer was sustained and the bill dismissed.

Judge Bellinger in suit 2406 held the decision was a nullity. He said:

> It goes without saying that there is no such thing as a demurrer to a general replication; such a replication is a mere formal matter and has the effect to put the case at issue, and there can be, thereafter, no judgment without the trial of the question of fact so presented. The general replication was in proper form, the form adopted in Story's Equity Pleadings, if it had been otherwise, and liable to objection, nevertheless, there could be no decree dismissing the bill on that account. I am of the opinion that the demurrer attempted to be pleaded is a nullity, but if it is not a nullity it is clearly not a decree upon the merits, and is, for that reason, not a bar to this suit (R. p. 499).

Suit 2406 was against the Coos Bay Wagon Road Company alone. The bill alleged that the lands were outside of the grant, except as to 40 acres, and that

the company had sold them. The prayer was that an accounting be had for the lands sold, and that the patent to the 40 acres be cancelled. The prayer was granted and judgment entered in favor of the plaintiff for $1,099.59.

Suit 2278 involved 40 acres of land. The bill alleged that the lands had been homesteaded before the grant attached, but the facts disclosed by the bill were held, on demurrer, to be insufficient to sustain the claim, and the bill was dismissed.

These suits were instituted a long time after defendant purchased.

XIX.

Defendant is not a Bona Fide Purchaser.

Under the head "The defendant had actual knowledge of the terms of the grant and of the breaches" (Supra, p. 42) are set out the admissions of the answer, the recital of the patents, the recital of the deeds, the knowledge in the community of the terms of the grant, the belief on the part of the people in the community that the owner of the land was bound to sell them in tracts of 160 acres, and at price not exceeding $2.50 per acre.

The admissions and the testimony show conclusively that the defendant company had actual knowledge of the terms of the two granting acts, of all the breaches which had taken place before it purchased, and that its officers, in common with the other members of the

community, must have known, before it purchased, that the title was in question.

OTHER TESTIMONY BEARING ON THE POINT.

Captain William H. Besse, the grantee in the deed from Crocker for the 35,533.93 acres and in the deed from the Coos Bay Wagon Road Company for the 61,133, was acting in the transaction for the Oregon Southern Improvement Company. Rotch so testifies (Rotch, R. p. 276).

Government's Exhibit 40 (R. p. 531), being the cash book of the Oregon Southern Improvement Company, shows that Besse's expenses from October 1, 1882, to February 1, 1884, in the sum of $2,157.89, were paid by that company.

The amendment to page 38 of the answer states that Russell Gray, one of the grantees, had no interest in the property, but took the title solely for the benefit of the Oregon Southern Improvement Company.

The witness Crapo testified that he caused a man by the name of Foster, an experienced timber cruiser, to go to Oregon and examine the lands. Foster did so and reported to the investors before the purchase of the lands was completed (Crapo, R. p. 277). Rotch testified that Foster made a voluminous report, and that he, Rotch, as treasurer of the company, paid him for his services (Rotch, R. p. 277). This investigation of the lands was made before the Oregon Southern Improvement Company completed the purchase.

It is strange that so much attention should have

been given to the character of the land, and little or no attention to the title, if we are to accept as true the testimony that the promoters knew nothing about the granting act or its terms.

In addition we have a letter from Elijah Smith, by Prosper W. Smith, his brother, written in May, 1885, to Metcalf, manager of the Oregon Southern Improvement Company, in which he states "we think you are right in your idea of charging them (settlers) a fair valuation for the land; we do not think that we should sell the land at $2.50 an acre if it is worth $10.00, and we don't see what we have to do with the Wagon Road Co.'s promises" (Govt. Ex. 76, R. p. 535).

On January 30, 1885, Metcalf wrote to Elijah Smith that there were a number of settlers on the lands who had been encouraged to settle on them by the promise of the old Wagon Road Company to sell at $2.50 an acre; that he was charging them $10.00 an acre for bottom land and $3.00 an acre for hill land; also "I propose to be easy with these settlers, as whatever they do on the land enures to our benefit eventually" (Govt. Ex. 78, R. p. 535).

This was two years before the Southern Oregon Company acquired title. Elijah Smith was one of the chief promoters of that company, as well as an officer of the Oregon Southern Improvement Company, and he figures very largely in the affairs of the Southern Oregon Company.

The two letters show that long before the Southern Oregon Company acquired the title, Mr. Smith and the

general manager of the Oregon Southern Improvement Company knew the terms on which the Wagon Road Company had agreed to sell to the settlers, and knew, too, that the settlers were insisting on compliance with the terms of the grant.

William Rotch, called by the defendant, formerly Treasurer of the Oregon Southern Improvement Company, testified that *stock* of that company was issued *only* to *persons who purchased bonds,* and all bonds issued were accompanied with stock of the same par value (Rotch, R. p. 276); that prior to the foreclosure proceedings under the trust deed to the Boston Safe Deposit and Trust Company, Rotch and Mandell were substituted as trustees. The reason this foreclosure took place was because the company was unable to pay its obligations and could obtain no money to carry on their business. The property was purchased in the foreclosure sale by the father of witness, William Rotch, and William Crapo, acting for the bondholders, who after purchasing, transferred the property to the Southern Oregon Company (R. p. 276). The property was paid for by issuing stock of the Southern Oregon Company. The stockholders of the Southern Oregon Company received a little more stock than was represented by the par value of their bonds in the Oregon Southern Improvement Company; practically all of the stockholders of the Oregon Southern Improvement Company were identical. Rotch designated the foreclosure proceedings and the organization of the Southern Oregon Company as the "re-organization" (Rotch, R. p. 276).

P. W. Smith, treasurer of the Oregon Southern Improvement Company, in a letter under date of May

6, 1887, referred to the foreclosure proceding as the "re-organization" (Govt. Ex. 76, R. p. 535).

Elijah Smith, president of the Oregon Southern Improvement Company, under date of April 14, 1886, outlines the method of procedure in the foreclosure proceedings and purchase of the property by the bondholders (who were also the stockholders), at a nominal price; instructions are given with reference to the foreclosure proceedings(Govt. Ex. 75, R. p. 534).

By letter of October 7, 1886, P. W. Smith, treasurer, instructs James Webster, secretary of the Oregon Southern Improvement Company, to furnish information to C. A. Dolph, who had charge of the foreclosure proceedings (Govt. Ex. 79, R. p. 535). Elijah Smith, June 17, 1887, informed C. A. Dolph that Loggie would bid at the foreclosure proceedings for the bondholders' committee and the minimum bid would not be over the bonded indebtedness.

C. A. Dolph, June 10, 1887, informed Elijah Smith with reference to the foreclosure proceedings, that the only money necessary to be advanced by the bondholders would be the costs of the foreclosure, and expressed the understanding that the property was to be purchased with the outstanding bonds of the Oregon Southern Improvement Company, and such bonds were then to be cancelled, advised that the property should be bid in at the foreclosure sale by a person having no connection with the Oregon Southern Improvement Company (Deft. Ex. 205, R. p. 538).

Elijah Smith, by P. W. Smith, June 20, 1887, in-

formed C. A. Dolph that Loggie was to bid for the Oregon Southern Improvement Company for the bondholders' committee, and that the maximum bid was to be $250,000, as Loggie had been instructed, also, that all but $40,000 of the bonds had then been deposited with the bondholders' committee in making payment at the foreclosure proceedings. Other communications passed between C. A. Dolph, attorney of the Oregon Southern Improvement Company, in charge of the fore closure proceedings, and officers of the company, con taining instructions, suggestions and approved plan relative to the foreclosure proceedings (Deft. Ex. 214, 231, 232, R. pp. 539, 542).

By an agreement of February 10, 1887, between the bondholders of the Oregon Southern Improvement Company, plans were agreed upon for the "re-organization" of the Oregon Southern Improvement Company, by the organization of the Southern Oregon Company, to be effected by the foreclosure of the mortgage given to secure the bonds of the company (Deft. Ex. 225, R. p. 542).

P. W. Smith, May 24, 1887, outlined to Barnabas Holmes, a bondholder of the Oregon Southern Improvement Company, the plan for the foreclosure and "re-organization" of the company. The plan outlined showed the only liability of the company as over-due interest on the outstanding bonds (Deft. Ex. 215, R. p. 540), also, on November 5, 1887, Smith informed Charles W. Plummer, a large bondholder of the Oregon Southern Improvement Company, that "a new company has been organized to take the place of the O. S. I. Co.; it is called the Southern Oregon Co. * * *" This letter

further states that the capital stock of the Southern Oregon Company was $1,500,000.00, which would be distributed among the old bondholders (Deft. Ex. 214, R. p. 539).

W. W. Crapo, called by the defendant, testified that only a sufficient amount of stock was issued by the Southern Oregon Company to satisfy the bondholders of the Oregon Southern Improvement Company (Crapo, R. p. 260).

George W. Loggie testified that he was one of the incorporators of the Southern Oregon Company, and was manager of the company; James Webster was a bookkeeper employed by the same company, and S. H. Hazzard was attorney for that company; also, that he bid in the property of the Oregon Southern Improvement Company at the foreclosure sale, under the instructions and as a mere figure-head for Elijah Smith or Elijah Smith's attorney. The foreclosure was in charge of Senator Dolph. He was instructed to bid $85,000 for the property for the Oregon Southern Improvement Company at the foreclosure sale and make a subsequent bid of $125,000. One share of stock of the Southern Oregon Company was in his name, but in fact was owned by Elijah Smith or P. W. Smith; *after* the *organization* of the Southern Oregon Company he managed the property *as he had done for the Oregon Southern Improvement Company* (R. p. 383).

Since the bondholders and stockholders of the Oregon Southern Improvement Company were identical, there was no necessity for foreclosing the trust deed in order that the bondholders might get control of

the property. They had that already. What then, was the necessity of the foreclosure and re-organization unless they desired to cover something, and build, if possible, the defense of "innocent purchaser?"

REFUSAL TO GIVE WARRANTY DEEDS.

G. P. Miller testified that the settlers who were put off the land did not buy, because the Southern Oregon Company would not give Warranty Deeds (R. p. 392). No one denies this.

XX.

Waiver, Laches and Estoppel.

The only evidence offered by the defendant for the purpose of showing notice to the government of breaches of conditions, other than the recording of deeds in Douglas and Coos counties, consists of statements in the pleadings in the suits commenced in 1896 and 1897, and heretofore referred to (*Supra,* p. 86).

There is no evidence showing that breaches were ever brought to the attention of Congress prior to the consideration of the bill authorizing the institution of this suit (*Supra,* p. 12).

XXI.

Alleged Equities of Defendant.

The defendant claims that the government by the act of 1874, the issuance of patents in pursuance of it, and the failure to bring suits earlier for forfeiture, induced it to believe that the title was sound. Neither

the language of the act nor the detail in the patents warrant this claim. Failure of government to act—laches—never raises any right, equitable or otherwise, against it.

Is there anything else in the situation which would require, or justify, equity in relieving defendant from any of the obligations imposed by the law?

NO COMPETENT PROOF THAT ATTORNEYS PASSED THE TITLE AS GOOD.

W. W. Crapo, called by the defendant, testified that prior to investing in the Oregon Southern Improvement Company, he instructed Captain Besse to have the question of title carefully examined, and Besse subsequently reported to him that the title had been examined by a Portland lawyer and pronounced good (Crapo R. p. 251). He never saw the opinion of this lawyer and Besse gave him no details. He denied having any knowledge of the restrictive proviso until about 1903 or 1904. But Mr. Crapo's memory is not good. He denied that he was a stockholder of the Southern Oregon Company (Crapo R. p. 260), but the records show that he had 280 shares (R. p. 358), and was a director and presided at a directors' meeting (Govt. Ex. 83, R. p. 536). It is strange, too, that a "leading lawyer" (Rotch, R. p. 279) should have taken the word of a sea captain as to the title of an extensive piece of valuable property.

William Rotch, called by the defendant, formerly treasurer of the Oregon Southern Improvement Company, testified that prior to the purchase of the grant

lands the company obtained a report that the title was good, but he could not give the name of the person making the report; never had any conversation with a lawyer to the effect that the title was good, and never saw any opinion from a lawyer upon the subject. He did not examine the abstract himself (Rotch R. p. 277), and had no knowledge, he said, of the restrictive proviso until after the Kinney contract (1902) (Rotch R. p. 279).

Robert E. Shine, called by the defendant, testified that the Southern Oregon Company had abstracts of title of the granted land in their office which purported to trace the title from the government to the Southern Oregon Company. He expressed the opinion that none of the abstracts showed a defect in title with regard to the grant.

The abstract referred to is marked Defendant's Exhibit 207 (R. p. 539). It shows that the lands came from the government to Coos Bay Military Wagon Road Company, and through mesne conveyances to the Oregon Southern Improvement Company. The abstractor therefore, must have consulted the patents. If he did, he knew they were issued in pursuance of the two granting acts. There is nothing in the abstract to indicate he had considered at all the terms of the two granting acts.

George W. Loggie, formerly manager of the Oregon Improvement Company, called by the defendant, testified that he had obtained an abstract covering the grant land and that attached to this abstract was an opinion prepared by Attorney Hazzard. He could not state

specifically what the opinion set forth as to the title but knew the thoroughness with which Hazzard did his work, and believed the opinion covered the conditions of the grant from the United States. He could not recall the conclusion reached as to the title or whether he stated the conclusion (R. p. 383). The Hazzard abstract was prepared prior to the organization of the Southern Oregon Company.

Defendant's Exhibit 207 (R. p. 539) is an abstract of title prepared by Hazzard and Wilson, and covers all of the grant lands now held by the Southern Oregon Company.

Exhibit 208 (R. p. 539) is the opinion attached to the abstract (Deft. Ex. 207), but contains no mention of the restrictive proviso or its effect upon the title. No other opinion relating to the grant lands was offered in evidence.

Charles R. Smith, now president of the defendant company, had told him that he, Elijah, had the opinion of a Pittsburg attorney concerning the title, but Elijah did not produce it, and he (Charles R.) never saw it (Smith R. p. 409).

Marshall J. Kinney testified that he had procured from the Southern Oregon Company an option on the lands, for which he paid $65,000 cash, and then attempted to sell them before completing the purchase. He entered into negotiations with several; finally a Mr. Wood of San Francisco expressed willingness to purchase, but upon examination of the title, found it was defective and refused to complete the deal.

Mr. Kinney says that prior to that time he had learned from Major Kinney that the title was defective by reason of the conditions in the grant. As the result, Mr. Kinney did not complete the purchase with the Southern Oregon Company and forfeited his payment of $65,000 (R. p. 320).

These gentlemen, it seems, had no difficulty in ascertaining that the title was defective.

MR. MALLORY'S RELATION TO THE MATTER.

It is stipulated that C. A. Dolph, at the time of his correspondence concerning the foreclosure of the mortgage given to secure the bonds in the Oregon Southern Improvement Company heretofore referred to, was a member of the firm of Dolph, Bellinger, Mallory & Simon, and up to the time of his death in 1914 was a member of Dolph, Mallory, Simon & Gearin; that Dolph brought suit to foreclose the mortgage against the Southern Oregon Company, and during all of the time from the foreclosure proceedings was with his firm, attorneys for Elijah Smith and the Southern Oregon Company (R. p. 401).

It is also stipulated that Rufus Mallory came into the firm above mentioned in September, 1883, and continued, until his death, in the firm, and was the same Rufus Mallory who was a member of congress at the time the bill, which subsequently became the Act of March 3, 1869, granting the lands in question to the State of Oregon, was pending in Congress (R. p. 401).

The first deed to the Oregon Southern Improvement

Company was made January 5, 1884, several months after Mr. Mallory had become a member of the firm. He knew that congress had inserted the condition subsequent with full knowledge of the character of the land, and, therefore, with the intention that the conditions would apply, even though the land was chiefly non-cultivable (*Supra*, p. 85).

COST OF THE ROAD.

E. N. Harry, who had been road supervisor in Coos County for about 21 years, had been over the Coos Bay wagon road many times and was familiar with the road, estimated the average cost of construction of the road at $500 a mile (R. p. 401).

W. H. Murray said he had worked upon the roads all his life, but it does not appear that he had ever been a contractor. He said he thought the road cost from $500 to $700 per mile (R. p. 391). Other witnesses testified as to the construction of various sections. There is nothing in their testimony which conflicts with that given by Harry and Murray.

ROAD OF LITTLE ADVANTAGE TO PUBLIC.

It is alleged in the answer that the transportation of troops and mails of the United States was greatly facilitated, especially as to distance, by the construction of the road (Siglin R. p. 388), (Weekly, R. p. 397), (Harlocker, R. p. 389), and in fact practically all of the witnesses who were called by either the complainant or defendant, testified that they had never seen or heard of United States troops passing over this road.

That prior to the construction of the road mail was brought into the Coos Bay country by pack horse. Subsequent to the construction of the road and during the winter season, pack horses had to be used in conveying the mail between Roseburg and Coos Bay as before.

TOLLS WERE COLLECTED BY WAGON ROAD.

For a long time the company collected toll, and a very good toll for the service rendered, so Buell (R. p. 400), Harry (R. p. 401), and Laird (R. p. 399) testified.

PURPORTED EXPENSES ON ACCOUNT OF THE LANDS.

C. G. Hockett testified to certain receipts and disbursements made in connection with the property of the Oregon Southern Improvement Company and the Southern Oregon Company. The following is his statement:

Receipts.

Sales of lands	$ 24,500.00
Sales of timber lands and timber	77,621.47
Leases of lands	10,937.44
Chittam bark	11,223.01
Total	$124,281.92

Disbursements.

Land expense, cruising, fire protection, etc	$ 17,229.61
Improvement on land made by lessees	1,399.05
Stumpage expenses, cost of delivering logs	4,475.35
Chittam bark, expenses of marketing	17,904.42
General expenses	218,207.83
General taxes	325,305.17
Special road taxes	5,787.47
School taxes	762.90
Legal expenses	6,077.15
Interest	218,829.49
Total	$815,978.44
Receipts	124,281.92
Excess disbursements over receipts	$691,696.52
Interest	218,829.49
Excess disbursements over receipts, other than interest	$472,867.03

(R. p. 286, et seq.)

The largest items were "General Expenses" $218,-207.83; "General Taxes" $325,305.17 and "Interest" $218,829.49. The item of "General Expenses" Hockett testified, included "general supervision" and other miscellaneous expenses relating not only to the grant lands but to the other properties of the companies, it being impossible to segregate the expense chargeable to the grant land from that chargeable to the other property.

The item of "General Taxes" undoubtedly includes taxes paid on property other than the grant lands, as Hockett testified that in Douglas County, up to and including 1908, $19,419.36 had been paid, while the itemized statement of such taxes shown by the records of Douglas County amounts to $14,409.54, exclusive of the year 1892, which could not have amounted to over $510.00. This would bring the total of the taxes paid to Douglas County up to $14,919.54. An official statement of the taxes paid in Coos County is not in evidence, but Hockett testified that up to and including 1908, $152,218.13 had ben paid by the companies in that county, and that the taxes for 1909 were $19,154.76, making a total of taxes paid and payable at the time of the institution of this suit $186,292.43. No taxes in Douglas County have been paid since 1908 (R. p. 293).

The item of "Interest," Hockett testified, is based upon two notes, one dated April 1891 and the other October 1896. The reason for charging this item to the grant land is not explained. Hockett also testified to an item of $17,000 for "Land Expenses" which included cruising, fire protection, etc., of the lands of the companies (R. p. 294).

It is impossible to conceive how the items mentioned by Hockettt could be chargeable to the grant land, which the undisputed testimony shows were practically all in a state of nature and required no attention from the company other than fire protection and examination such as is covered in the item of "Land Expenses" and the payment of taxes. However, practically all of the expenses incurred in the protection and maintenance of these lands were for the purpose of holding the lands for speculation in violation of the intention of the granting act.

As illustrative of the unreliable character of the Hockett statement of receipts and disbursements, it is shown by the testimony of M. J. Kinney (R. p. 400) that he and his associate paid to the Southern Oregon Company, $65,000, in connection with the grant lands, but this item is not credited in the Hockett statement.

VALUE OF THE LANDS.

The bill alleges the value of the lands to be four million dollars. The answer denies this and asserts that they are not worth to exceed one million dollars.

The cruises of the lands show that they contain 2,359,081,000 feet of lumber. This, at an average of one dollar a thousand, would amount to $2,359,081 and does not take into account the value of the land after it had been denuded (*Supra,* 83).

The witness Thrift said that since 1900 the land had become quite valuable for timber (R. p. 229).

Defendant's Exhibit 177 (R. p. 537) shows a classification of the lands into tillable and non-tillable, for the purposes of taxation. County Assessor Thrift says that the classification is not correct; that some of the land classified as non-tillable is tillable (R. p. 229). He also says that the State Tax Board considers the assessed valuation in Coos County as 69 per cent of the actual value (R. p. 230).

The witness Murray said that the present value of bottom lands was from $100 to $200 per acre (R. p. 391).

POLICY OF DEFENDANT AND ITS PREDECESSORS IN TITLE IN REFUSING TO SELL HAS BEEN INJURIOUS TO THE COMMUNITY IN WHICH THE LAND IS LOCATED.

Many witnesses testified to the paralyzing effect upon the development of Southwestern Oregon of the policy pursued by the Wagon Road Company and its successors in title.

A. T. Siglin, formerly County Treasurer and Sheriff of Coos County, testified that the failure to sell grant lands had retarded the development of the country, thus holding large tracts idle. A large portion of the lands could readily have been disposed of, he thought, if the companies had been willing to sell (R. p. 388).

Isaac Taylor Weekly testified that if the company had sold the lands in quantities of 160 acres at $2.50 an acre as required by the grant, the population over the area of the grant would have been greater, and that the failure to comply with the conditions had retarded the settlement of the country. He referred to

the failure to sell bottom and bench lands (R. p. 398).

Earl Harlocker testified that if the Coos Bay Wagon Road Company had sold the land there would have been more settlers along the road (R. p. 390).

Albert E. Bettis, witness for the defense, testified that the refusal of the Coos Bay Wagon Road Company to sell had prevented settlement in the neighborhood in which he resided (R. p. 237).

George W. Loggie, who for five years had been manager, first of the Oregon Southern Improvement Company, and then of the Southern Oregon Company, and was, in addition, a director and vice-president of the Southern Oregon Company, testified that the policy of the two companies in refusing to make sales within the terms of the restrictive proviso retarded the development of the country, as their property covered a large part of the country, and that on general principles adherence of that kind of policy would retard the growth of any place (R. p. 384).

That these witnesses are correct must be apparent.

Respectfully submitted,

CONSTANTINE J. SMYTH,
Special Assistant to the Attorney General.